TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 169.

I. H. ADAMS, PLAINTIFF IN ERROR,

vs.

J. M. CHURCH, ADMINISTRATOR OF R. M. STEEL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF MALHEUR COUNTY, STATE OF OREGON.

FILED DECEMBER 16, 1902.

(18,752.)



16071

(18,752.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 169.

I. H. ADAMS, PLAINTIFF IN ERROR,

vs.

J. M. CHURCH, ADMINISTRATOR OF R. M. STEEL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF MALHEUR COUNTY, STATE OF OREGON.

INDEX.

	Original.	Print.
Caption	*a*	1
Complaint	1	1
Demurrer to complaint	9	5
Order overruling demurrer	11	5
Answer	13	6
Exhibit A—Articles of agreement between Robert M. Steel and I. H. Adams, November 17, 1885	31	15
Reply	34	17
Motion to substitute J. M. Church, administrator, as party plaintiff	44	22
Order to substitute J. M. Church, administrator, as party plaintiff	46	22
Findings of fact	48	23
Conclusions of law	55	27
Decree	56	28
Notice of appeal	59	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 27, 1903.

	Original.	Print
Undertaking on appeal	63	30
Mandate from supreme court of Oregon	66	31
Decree on mandate	72	34
Certified copy of opinion of supreme court of Oregon	78	37
Clerk's certificate to record	90	44
Petition for writ of error	91	44
Order allowing writ of error	93	45
Assignment of errors	94	45
Writ of error	98	47
Bond on writ of error	99	48
Statement of clerk as to filing writ of error, &c	103	49
Marshal's return of service of citation	104	50
Citation	105	50
Clerk's statement of costs	106	50
Return to writ of error	107	51

a In the Circuit Court of the State of Oregon for Malheur County.

J. M. CHURCH, Administrator of the Estate of R. M. Steel, Deceased, Plaintiff,
vs.
I. H. ADAMS, Defendant. } Transcript.

1 Be it remembered that heretofore on the 18th day of September, 1896, a

Complaint

was filed in the office of the clerk of the circuit court of Malheur county, Oregon, in words and figures as follows:

In the Circuit Court of the State of Oregon for Malheur County.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

That plaintiff complains of defendant and alleges:

I. That on or about the 17th day of November A. D. 1885 the plaintiff and defendant entered into a copartnership under the firm name and style of Steel and Adams for the purpose of carrying on the business of farming and stock raising in what is now Malheur county, Oregon, for a period of ten years from and after December 1st, 1885, (unless sooner dissolved).

II. That by the terms of said agreement of partnership the plaintiff was to advance the sum of $10,000.00 in money as his share of the capital invested, against which the defendant, as his share, was to furnish the "labor, services, care and attention, of himself and family in the conducting prosecution and management of the business of the partnership in a diligent manner and protect the same from loss," and that further he was to furnish the board of all the necessary employees, of the firm in said business at his own
2 expense, the partnership paying the wages simply of all such hired help; that further the defendant was to account to the partnership for the products and proceeds of the business, and for such purpose was to keep and maintain regular books of entry & account, open and subject *to* all times to the inspection of all concerned; that further at the end of the aforesaid term of partnership the plaintiff was to have returned to him said capital by him invested to wit: the said $10,000 and an equal division of all the profits and property arising out of said investment and business, after paying his share of the existing liabilities of said firm, or business being one half share.

III. That in pursuance of said agreement the plaintiff invested said sum of $10,000 cash, and plaintiff and defendant entered into said partnership and the same has continued to this day, although the term thereof has expired by limitation.

IV. That plaintiff is now and has been most of the time during said partnership term, a non-resident of the said county of Malheur, wherein said partnership business has been conducted and firm properly situated, and has been compelled to rely almost exclusively on the management and conduct of said partnership business and property by defendant, and defendant has so controlled and managed said business and firm, property, and is still in possession of all of the same, and of most of the books of account of the said firm business.

V. That defendant has mismanaged said business and made bad investments of firm money, property and profits, and by reason thereof, the plaintiff has been compelled to advance to and
3 for said partnership various sums of money in addition to his investments, to save the firm property and business from loss and sacrifice, and from pressure of firm debts, in the aggregated sum of about $40,000, no part of which has been repaid him, and all of which has been long since due, him, and defendant makes no effort to reimburse him therefor, but continues to make extravagant and unnecessary investments, and contract unnecessary expenses.

VI. That of the money so invested in said partnership by plaintiff, and the said money advanced said firm, and for said firm and business, there has been purchased by and for said partnership and really belongs to said firm,

The east half of the north west quarter, and the north half of the north east qr., of sec. 20 twp. 15 south range 40 E. W. M. and the west half of the north east qr. and the north east qr. of the noerth east qr. and the north west qr. of the south east qr. of sec. 26, in twp. 15 south of range 39 E. W. M., W. ½ S. E. ¼, E. ½ S. W. ¼, E. ½ S. E. ¼, E½ N. E. ¼, and the west half of the north west quarter, and the west half of the south west qr. of sec. 24 in twp. 18, south of range 45 E. W. M. all in Malheur county, State of Oregon, together with many and valuable and permanent improvements, thereon of the approximate value of about $5000, as well as in the purchase and production of a large number of horses, and cattle, chickens, bees and app-ratus, a large quantity of hay and grain, farming implements and machinery, as well as a valuable water right, on the Malheur river for domestic use and irregation of said farming lands, embracing 1600 shares of the capital stock of the Nevada Ditch Co. all of which personal property is of the aggregate value of $10,000, the detailed description of which plaintiff is unable to give herein.

VII. That defendant in his management of said partnership business and property, has indulged in many fruitless schemes incurring so many debts, and invested so badly that the firm liabilities
4 far exceed the assets, and only by careful management, will the same be made to realize any considerable value, that

said partnership business has been and still is proving very unremunerative, so that the creditors of the firm threaten to, and will unless matters are properly adjusted, seize upon and sacrifice the partnership property, and upon plaintiff's property for any deficiency.

VIII. And further, plaintiff avers that defendant has applied the firm property and labor to his individual use and benefit, without right or consent of plaintiff, and contrary to the terms of said partnership, and that further he is insolvent and unable to pay his part of the firsm indebtidness, or any part of plaintiff's advances or loans, and any further management by him of said property or business would entail further loss, and he should be restrained by the court from further managing or controlling the same.

IX. That of said real estate the said west half of the south east quarter and the east half of the south west quarter of sec. 24 tp. 18 south, of range 45 E.W.M. the said defendant has procured the title to be taken in his own name, and placed thereon valuable improvements, consisting of fences, orchards, wells, and windpump, at great cost and expense, when in truth and in fact the same were bought with partnership funds, and the plaintiff alleges the same to belong to said firm and the said defendant should be required to account for such property and convey the same to said partnership.

X. That although said partnership term and limitation has long since expired and plaintiff has demanded a dissolution thereof, a settlement of the same and an accounting by the defendant according to the terms of said agreement, the defendant has refused and neglected, and still refuses and neglects to so settle, with plaintiff his just demands, and still refuses to account to plaintiff according to the terms of said partnership and agreement, as he is required to do.

XI. That unless said property is preserved and properly managed, so as to prevent further loss and to prevent litilation and sale by distress, the same will be wasted, the firm debts go unpaid, and plaintiff will be compelled to make up the deficiency out of his individual property to his great loss and damage.

XII. Plaintiff therefore alleges that it is necessary to conduct the said business, of said partnership so as to save loss, for a period of from six to twelve months hereafter, and it is necessary for the appointment of a receiver to take charge of the firm assets and manage the said business under the orders directions and decrees of this court, and to wind up the affairs of the said partnership and dispose of the said firm property in an impartial and business like manner so that neither plaintiff or defendant shall be injured or prejudiced.

That plaintiff has no plain, speedy or adequate remidy herein at law, and this suit is brought to prevent a multiplicity of actions.

Wherefore the plaintiff prays that defendant be enjoined from further manageing or controlling, or disposing of or incumbering any of said partnership property or business, and that receiver be immediately appointed by the court, to take charge of the assets of every description, belonging to the partnership, and manage the

same under the direction, orders and decrees, of the court, that to preserve and sell the same for the benefit of said pertnership and pay off the firm indebtidiness out of said assets.

6 2. That said firm of Steel and Adams be dissolved, and that the affairs thereof be wound up according to law,

3. That defendant be required to account to plaintiff and under the direction of the court for all the transactions of the said firm, and for plaintiff's advancements and just dues, therein, and property and moneys by him handled and expended both for the firm and himself;

4. That after the firm debts and liabilities are paid, that if there be any thing left, that this plaintiff may have returned to him his capital therein invested, and his claims fully paid and his share of the profits of said business,

5. That defendant be required to convey to the partnership what property he may have in his individual name which according to equity belongs to said firm,

And for general relief and such as the court in good conscience shall deem meet in the premises, and for costs and disbursements of this suit.

C. H. FINN,
Attorney for Plaintiff.

7 STATE OF OREGON, }
County of Union, } *ss:*

I, Geo. A. Steel being first duly sworn, say that I am the agent of plaintiff in the above entitled suit, and have knowledge of the facts herein, and that the foregoing complaint is true as I verily believe.

GEORGE A. STEEL.

Subscribed and sworn to before me this 14th day of September 1896.

[NOTARIAL SEAL.] C. H. FINN,
Notary Public for Oregon.

8 No. — In the circuit court of the State of Oregon, for Malheur county. R. M. Steel—plaintiff, *vs.* I. H. Adams—defendant. Complaint in equity Filed Sept. 18th 1896, C. W. Platt, county clerk. C. H. Finn, attorney and notary La Grande, Oregon. attorney for plaintiff.

9 And afterwards on the 30th day of September, 1896, there was filed in the office of said clerk a

Demurrer

to said complaint as follows:

In the Circuit Court of the State of Oregon for Malheur County.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

Now on this day comes the defendant I. H. Adams, by his attorney R. G. Wheeler, and demurs to said plaintiff's complaint filed herein, on the following grounds to wit:

First. That plaintiff has not legal capacity to sue, and for the further reason that no demand was ever made upon said defendant, by said plaintiff, for the settlement of said partnership affairs, existing between said plaintiff and defendant,

Second. That said complaint does not state facts sufficient to constitute a cause of suit.

R. G. WHEELER,
Attorney for Defendant.

10 In the circuit court of the State of Oregon for the county of Malheur R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Demurrer Filed Sept. 30th, 1896. C. W. Platt, county clerk. R. G. Wheeler, attorney for defendant.

11 And afterwards on the 7th day of December A. D. 1896, it being the first day of the regular term of said court there was made the following

Order Overruling Demurrer.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant. } Equity. No. 75.

Now at this time this cause coming on to be heard, upon the demurrer to complaint heretofore filed herein, plaintiff appearing by C. H. Finn, Esq. of counsel, and the defendant by R. G. Wheeler, his attorney, and the parties by their respective attorneys consenting thereto

It is ordered and adjudged that the demurrer to the complaint herein be and the same hereby is overruled by consent.

12 In the circuit court of the State of Oregon, for the county of Malheur. Journal entry. R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Filed December 7th, 1896. C. W. Platt, county clerk.

13 And thereafter, to wit: on the 9th day of December, 1896, there was filed in the office of said clerk an

Answer

in words and figures as follows to wit:

In the Circuit Court of the State of Oregon for Malheur County.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant. } Answer.

Comes now the defendant above named I. H. Adams, and for answer to the plaintiff's complaint on file herein, admits, denies and avers as follows:

Admits that on the 17th day of November A. D. 1885, the plaintiff and the defendant entered into co-partnership, under the firm name and style of Steel and Adams, for the purpose of carrying on a business of farming and stock raising in what is now Malheur county, Oregon, for a period of ten years from and after December 1st, 1885, unless sooner dissolved.

Admits that by the terms of said agreement of partnership that plaintiff was to advance the sum of $10,000 in money as his share of the capital to be invested, in the business of said co-partnership, but denies that said agreement of co-partnership provided that defendant should furnish as his share, the labor services care and attention or care or attention, of himself and his family, in conducting, prosecuting and managing the business of the partnership in a diligent manner, and to protect or in protecting the same from loss

14 or that the defendant promised or agreed, in or by the terms of said agreement, to furnish the board of all or any of the necessary employees, of the firm or any firm, in said business or at all, at his own expense or otherwise, or that said partnership was simply to pay the wages of all said hired help or other wise, except as in said contract or agreement set forth, a copy of which is hereto attached marked Exhibit A and made a part of this answer.

Denies that said agreement of co-partnership provided, that the defendant was to account to the partnership for the products or proceeds of said or any business, or that the same was made the duty of his defendant, any more than that of plaintiff, or that, for such purpose defendant was to keep or maintain regular or other books of entry or account, open or subject at all times to the inspection of all or any one concerned,

Defendant denies that at the end of the aforesaid term of partnership, plaintiff was to have returned to him said capital by him invested, to wit: said $10,000 or an equal division of all the profits and property arising out of said investment or business, after paying his share of the existing liabilities of said firm or business,

being a one-half share or otherwise, except as in said contract provided, which is hereafter set forth.

Admits that in pursuance of said agreement or partnership between the plaintiff and the defendant, the plaintiff invested the sum of $10,000 in the business of said firm, and plaintiff and the defendant entered into such partnership, and that the same has existed to this day, although the term thereof has expired by limitation, but

15 Defendant denies that said sum or any part thereof, has remained invested in the business of said firm,

Admits that plaintiff is now and has been most of the time, during such partnership, a non resident of said county of Malheur, wherein said partnership business has been conducted, and said partnership property is situated, but

Denies he has been compelled to rely almost exclusively, or otherwise, on the management and conduct of said partnership business or property by the defendant or anyone, or that defendant has so controlled and managed said business, or firm property, or is still in possession of all of said property, or of all of said books of account, of said firm or any firm.

Denies that defendant has mismanaged said business or made bad investments for the firm of any money, property or profits, or that by reason thereof plaintiff has been compelled to, or did advance to or for said partnership various sums of money in addition to his or any investment, to save the firm or any property or business, from loss or sacrifice, or from pressure of firm debts, in the aggregate sum or any sum of $40,000 or otherwise.

Denies that no part thereof has been repaid to plaintiff, or that the same or any part thereof, has long since been due him, or any one.

Denies that defendant makes no effort to reimburse, plaintiff therefor, or that he continues to make extravigant, or unnecessary or any investments, or to contract unnecessary or unreasonable expenses.

16 Denies that with the money so invested, in said partnership by the plaintiff, or any one, or of the said money advanced said firm, or to or for said firm, there has been purchased by said firm, or for said partnership, or there really belong to said firm, any real or personal property purchased with said money so furnished by the plaintiff, or any one, but defendant admits, that said partnership owns, the east half of the north west quarter, and the north half of the north east quarter of sec. 20 tp. 15 south of range 40 E. W. M. and the west half of the north east qr. and the north east quarter of the north east quarter and the north west qr. of the south east qr. of sec. 26 in tp. 15 south of range 39 E. W. M. and admits that said partnership owns, east half of the south east qr., and the east half of the north east qr. of section 24 in tp. 18 south of range 45 E. W. M. all in Malheur county, State of Oregon, together with many and valuable permanent improvements thereon, of the approximate value of about $5,000, but defendant denies that with the money so

or otherwise invested, in said or any partnership, by the plaintiff or any one, or that plaintiff ever so invested any money, or with the said or any money, advanced to said firm or for said firm, or to or for said business, there has been purchased, by or for said or any partnership, or that there really or otherwise, belongs to said or any firm, the west half of the south east qr., or the east half of the south west quarter, or the west half of the south west qr., or the west half of the north west qr., of section 24, or any section, in township eighteen or elsewhere, south of range 45 E. W. M. in Malheur county,
17 State of Oregon or at all, or that said partnership has any interest in, the improvements or any part thereon, and denies, that out of money so or otherwise furnished, to said or any partnership, there has been purchased, or that the same has been used in the purpose or production of a large or any number of horses or cattle, or chickens or bees, or apparatus, or a large or any quantity of hay, or grain or farming implements, or machinery, or valuable or any water right, or rights, in the Malheur river or elsewhere, or for domestic or other use, or in irrigation or otherwise, of said or any farming lands, embracing or otherwise, 1600 or any number of shares, in the capital or other stock of the Nevada or any ditch company, and denies, that all of said personal property is of no greater than the aggregate value of $10,000, denies that plaintiff is unable to give a detailed description of all of said personal property, and each and every part thereof, and defendant alleges the fact to be, that the personal property mentioned in plaintiff's complaint, is of the reasonable aggregate value of $35,000.

Denies that defendant in his management or otherwise, of said or any partnership business or property, has indulged in many or any fruitless schemes, or in any scheme or schemes, or incurred so much debt, or any debts, or invested so badly, or otherwise, that the firm or any liabilities, far or at all, exceed the assets of said firm.

Denies that only be careful management, in the future will the said property be made to realize, any considerable value, but
18 all-ges that the same can now be sold, for a very, large sum of money,

Denies that the said partnership or any business, has been or still is, proving very unremunerative, or unremunerative at all, or that the creditors of said firm threaten to, or will, unless matters are properly or otherwise adjusted, seize upon or attempt to seize upon or sacrifice said partnership or any property, or upon plaintiff's or any one's property, for the, or any deficiency.

Denies that the defendant has applied the firm property or labor to his own individual use or benefit, or that he did so without right or against the consent of plaintiff, or contrary to the terms of said or any partnership, or that he is insolvent, or unable to pay his part of the firm's or any indebtedness, or to pay the plaintiff's or any one's advances or loans,

Denies that the further or any management by the defendant of said or any property, or business would entail further or any loss, or that said partnership has suffered any loss, or losses or defendant,

should be restrained or otherwise interfered with by this or any court, from further or otherwise managing, controlling or conducting the same,

Denies that all of said or any real estate, said west half of the south east quarter, or the east half of the south west quarter, of section 24 or any section, in tp. 18 south of range 45 E. W. M. or elsewhere, defendant has procured or caused title thereto, to be taken in his own or any one's name, or placed thereon any or valuable improvements, consisting of fences or orchards or wells, or windmills,
or wind or other pump, at great or any cost, or expense to said
19 firm, or that the same in truth or in fact, or at all were bought with partnership funds, except as hereinafter alleged,

Denies that although said partnership term, or limitation has expired, that plaintiff or any one, has demanded a dissolution thereof, or a settlement of the same or any part thereof, or an accounting by the defendant, according or otherwise, to the terms of said, or any agreement, or that the defendant has refused or neglected, or still refuses or neglects, to settle with the plaintiff or any one of his or any debts or demands, or still refuses to account to the plaintiff or any one, according to the terms of said or any partnership or agreement, or any agreement, as he is required or bound to do,

Denies that unless said property is preserved, or properly managed so as to prevent further or any loss, or that the same has been improperly managed, or that any loss has been sustained, or to prevent litigation, or sale by distress or otherwise, the same will be wasted, or that the said firm debts will go unpaid, or that plaintiff will be compelled to make up the or any deficiency, out of his individual or other property, or that he has any individual or other property, to make up any deficiency, to his great or any loss, or damage or at all.

Denies that it is only necessary to conduct the said business, of said partnership so as to save loss, for a period of from six to twelve months hereafter, but alleges the fact to be, that the same cannot be wound up, and the firm disposed of, at one half their actual value, in less than two years,

Defendant denies that it is necessary or proper that a re-
20 ceiver or any one should be appointed to take care or charge of the firm or any assets, or manage the said or any business under the orders, directions or decrees of this or any other court, or to wind up the affairs of said or any partnership, or to dispose of the said firm or any property, in any impartial or businesslike, or other manner, or that the appointment of a receiver herein, will not result in great injury to the rights of this defendant, and of said firm,

Denies that plaintiff has no plain speedy and adequate remidy at law, and denies that this suit is brought to prevent a multiplicity of actions, or that it was necessary to bring this or any other suit to wind up the affairs of said partnership, or that any suits or actions were threatened or about to be commenced at said time,

And for a further and separate answer and defense to plaintiff's complaint on file herein, defendant complains and alleges:

That on the 17th day of November A. D. 1885, plaintiff and this defendant entered into co-partnership, under the firm name and style of Steel and Adams, for the purpose of carrying on the business of farming and stock raising, in what is now Malheur county, Oregon, for a period of ten years from and after December 1st, 1885, unless the same should be sooner dissolved, as in plaintiff's complaint alleged.

That said agreement of copartnership was in writing a copy of which is hereto attached, and made a part of this answer, marked "Exhibit A."

That it was further stipulated and agreed by and between
21 the parties hereto that plaintiff should pay unto said firm, as his own part and share of the capital stock, of said company the sum of $10,000, and that the same should remain invested in the said business, during the continuance of said partnership, without interest, and the defendant in and by said agreement, undertook and agreed to furnish, as his part of the capital stock of said company, the labor and services care and attention, of himself and family, in the conducting, prosecuting and management of said business of said partnership, and that the labor care and attention, of himself and family, should be given and bestowed upon said business, of the said company with diligence, and that he would use every effort to advance the business interests of said company, and to protect the same from loss.

It was further stipulated and agreed that all the labor which might be required from time to time, in the transaction and conducting of said business, beyon- what could be reasonably supplied by the defendant and his family, should be paid for by the company, That all supplies for the support of the table, of the defendant with lights for house, should be furnished by the said company, and that all the employees of said company, after the supplies should be furnished as aforesaid should be baorded by the said defendant with charge to the said company.

It was stipulated and agreed that the products of the farm not needed for the use of stock, or supplies for the family, of the defendant, should be disposed of to the best advantage, for the benefit of the company and accounted for and all stock when suitable
22 for market, might likewise be disposed of for the company's account, and accounted for in like manner,

That correct and accurate books of account should be kept, upon which should be entered, under particular headings and dates, all the transactions of business by and with said company, which said books should at all times, be open to the inspection of all parties thereto, or their duly appointed agents, (but defendant alleges that it was and is as much the duty of the plaintiff, to keep such books as in said agreement provided for, relating to business transactions, to and with said company, as it was and is of the defendant.)

It was further agreed by and between the parties to said partner-

ship contract, that at the expiration of said ten years, the said $10,000 agreed to be furnished by the plaintiff to said partnership, should be repaid without interest thereon, and the profits after defraying all expenses, paying all debts and liabilities, at said time owed by said firm, should be divided equally between the parties thereto.

That under and pursuant to the terms of said agreement, of copartnership, and not otherwise, plaintiff advanced the said sum of $10,000 at various times to said firm.

That at various times since the formation of said partnership, the plaintiff has advanced other sums of money, other than the said $10,000, but the said $10,000 and the said other sums of money, advanced by plaintiff, for or on behalf of said copartnership, did not exceed in the aggregate, defendant believes, the sum of $18,000, but defendant is unable to state the exact amount thereof.

23 That at various times since the formation of said copartnership, plaintiff has received large amounts of horses, cattle, money, checks, script, bacon and honey, as well as labor of horses, the use of machinery, and tools belonging to said copartnership, as well as the labor and services, of men employed by said copartnership, and who were paid out of the funds thereof, as well as the labor and services of the defendant, and his wife, of the reasonable aggregate value of $42500.00 ($42500.00).

That in 1886 about the month of April, said plaintiff received 21 head of horses, the property of said copartnership, and agreed to pay said firm therefor, the sum of $2100.00 *dollars*, that in 1887 about the month of August, said plaintiff received one horse, the property of said firm and agreed to pay said partnership therefor, the sum of $75.00 that during said year plaintiff received in checks, which at said time where good and collectible, the sum of $500.00, and which were the property of said firm, that in 1888 about the month of April, plaintiff received $500.00 in cash, the same being the property of said firm and at said time said plaintiff received, $111.00 in county script, of Baker county, State of Oregon, that said script was the property of said firm, that in 1889, about the month of August, said plaintiff received 96 head of horses, the property of said partnership, that at said time no price was agreed upon, for the said horses, but thereafter plaintiff and defendant agreed, that plaintiff should pay the said partnership, and that there should be charged to the said plaintiff, for the said horses, the sum of $6,000; that in

1893, about the month of April, plaintiff received 220 head

24 of beef cattle the property of said copartnership, and sold the same, receiving therefor the sum of about $10,000 the exact amount being unknown to the defendant, that in said year, about the month of October, said plaintiff received 42 head of horses, the property of said copartnership, and agreed to pay said firm therefor, the sum of $65.00 per head, that in the year 1895, about the month of March of said year, plaintiff shipped and sold 353 head of beef steers, the property of said copartnership, and received the funds arising from the said sale to wit: about the sum of $20,000 the amount of said sale being unknown to said defendant, that during

the year 1892, plaintiff received one pump and pipe, the property of said co-partnership, of the reasonable value of $35.00 and during said year, plaintiff used one span of work horses, for his own private use and benefit, for about one hundred days, said horses being the property of said firm, and the services thereof for the said time, being of the reasonable value of about $100.00.

That plaintiff has not paid the said firm, for the said property, nor any part thereof, and said property horses cattle script, money, checks, labor, services, of horses, nor no part thereof, has ever been accounted for, by the plaintiff, and he has failed and neglected and refused, to account to and with this defendant therefor.

That plaintiff is the owner of the west half of the north east qr., and the east half of the north west qr., of section 24 tp. 18 south range 45 E. W. M. that after the purchase thereof by the plaintiff, and at his special instance and request, this defendant ditched
25 cleared, broke up leveled fenced and enriched the soil thereof, and built and erected levees thereon, and caused water to flow over and across the said land, for artificial and surface irrigation thereof, that said improvements were all placed upon said land, with the horses machinery men and labor, of said copartnership, and the same was paid for out of the funds thereof, and the said improvements are of the reasonable value of about $750.00, that the same should be charged to the account of plaintiff,

That in the year 1894, plaintiff received from said firm a large amount of bacon and honey, the property of said firm, of the reasonable value of about $325.00 the exact amount in value thereof, being unknown to the defendant, and in 1896, plaintiff also received a large amount of honey, from said firm, of the reasonable value of about $100,00 but plaintiff has never accounted to or with this defendant, for the said bacon or the said honey.

That under the terms of said contract, and agreement of copartnership between the plaintiff and the defendant, this defendant was to furnish no money, or property to carry on, or conduct the business of said firm, and was only to furnish the services, labor care and attention of himself and family in the said partnership, during the existance thereof,

That defendant fully kept and performed the terms and conditions, of said agreement upon his part to be kept and performed, so far as was within his power so to do.

26 That soon after the formation of said copartnership, the said firm invested in a large number of horses, and has ever since been extensively engaged, in the raising of horses cattle and hogs, and in the improvement of the lands of said firm.

That after the formation of said copartnership, and after the purchase of a large number of good brood mares, and fine well bred horses, horses began to decline in price, and it is now almost impossible to sell the same, without great loss and sacrifice.

That said partnership now own about 1000 head of first class, well bred horses, about 80 head of stock cattle, and about 125 head of stock hogs, about 180 stands of bees, 4 first class jacks, 1600 shares

of the paid up capital stock of the Nevada Ditch Company, a large amount of machinery, consisting of mowers, rakes, harrows, plows, scrapers, reapers, derricks, derrick forks wagons, buckboards, blacksmith tools, hay, grain, fruits, vegetables, and 480 acres of land, together with valuable improvements thereon, consisting of houses, barns, sheds, corrals, fencing and out buildings, and the said real and personal property is of the reasonable aggregate value of $45,000, and if a receiver is put in charge of said property, great expense will unnecessarily, be incurred in managing selling and disposing of the same, and this defendant will be greatly injured by the appointment of a receiver herein.

That defendant can manage and control said property, at a very much less expense than any receiver appointed by this court.

27 That said firm owns the east half of the north west quarter, and the N. half of the N. east qr., of section 20, tp. 15 south range 40 E. W. M. the west half of the north east quarter, and the north east qr., of the north east qr. and the north west qr. of the south west qr. of section 26 in tp. 15 S. R. 39 E. W. M. and the east half of the north east ¼, and E. ½ S. E. ¼ sec. 24, tp. 18 S. R. 45 E. W. M. together with the improvements thereon, also 640 acres of road land known as the Home place on Willow creek, together with valuable improvements thereon, which were placed there by the said company, at its expense and out of the funds of the said firm, but plaintiff has taken the title to the said place in his own name, and caused the rights of the occupant thereof, to be conveyed to him, and although often requested, and notwithstanding he has repeatedly promised to convey to defendant a one half interest therein, he has failed and neglected to do so.

That the books, papers, bills, receipts, and vouchers, relating to the business transactions, between the plaintiff and the defendant as copartners, have nearly all at various times, been taken possession of by the plaintiff, and for a long time, and are still now in his possession, and under his control, and although often requested to return the same, to the place of business of said firm, has failed and neglected to return the same, or any part thereof, and for a further and separate answer and defense to plaintiff's complaint, defendant complains and alleges:

That long prior to the time, when the plaintiff and the defendant entered into the articles of agreement and co-partnership, a

28 copy of which is hereto attached, marked Exhibit "A" and made a part hereof, the defendant had filed under the timber culture act of the United States, the west half of the south east quarter, and the east half of the south west quarter, of section 24 tp. 18 S. R. 45 E. W. M. and that prior to the making of said contract, between the plaintiff and the defendant, this defendant had cleared off, and prepared for artificial irrigation, about 60 acres of said piece or parcel of land, and every year since the said time, the said land has been cultivated, and the crops produced thereon, consisting of potatoes, grain and alfalfa, used and appropriated by the said firm.

That the crops of hay and grain raised upon said land of this defendant, and used for the ben-fit of said co-partnership, far exceed in value any improvements, that have been placed thereon, by this defendant, out of the fund belonging to this copartnership.

That for several years past, fully 110 acres of said piece of land, the property of this defendant, has been in a high state of cultivation, and producing very large crops of hay and grain, and the whole of said crops have been appropriated, by said firm, and the reasonable rental value of the said land, during the continuance of the said partnership, has been $2000.00, and defendant has never received any compensation from said firm therefor.

That the title to said land is still in the United States, that defendant is the equitable owner thereof, and the same is the separate and individual property of this defendant.

29 That in and by the terms of said articles of co-partnership, said co-partnership, *and* was to furnish nothing to said firm, except the labor care and attention, of himself and family, during the existance of said partnership,

That about the 1st day of January 1886, defendant furnished to said partnership, money and property amounting in the aggregate, to about $600.00 and said firm never repaid defendant, said sum or any part thereof, and the same is still invested in said business.

That in the month of October 1893, at St. Johns, in the State of Michigan, this defendant at the instance and request of plaintiff, executed and delivered to plaintiff as an accommodation and without any consideration therefor, his certain promissory note for about the sum of $1500.00, the exact amount thereof, being now unknown to the defendant, and at said time plaintiff promised and agreed, to take up and pay off said note at its maturity, and not to allow the same to cause this defendant, any loss or trouble, but plaintiff has never returned the said note to defendant,

Wherefore defendant prays, that the receiver heretofore appointed herein be discharged, that this defendant be allowed to manage and conduct said business, wind up the affairs of said co-partnership, sell and dispose of the property thereof, and pay the firm indebtidness, that the plaintiff be compelled to account to and with this defendant, for the amount of money notes checks, script, and other property belonging to said firm, appropriated to his own use; that he be required to return the books accounts papers, and vouchers, and receipts now in his possession before the further progress of this case so the defendant may be enabled to make up his

30 accounts with said firm, that he be required to convey to this defendant, a one half interest in the road land described, that he be required to cancel and deliver up, the accommidation note above described, that the value of the crops upon the timber culture of this defendant, during the existance and continuance of said partnership be ascertained, and the rental value of the timber culture offset against the improvements placed thereon, with the funds of said firm, and if the rental value of said timber culture for said time shall exceed in value the improvements aforesaid, that

defendant have credit on the books of said firm, for said excess, that plaintiff be compelled to pay to said firm, the value of the improvements, placed by said firm upon the individual land of plaintiff, that defendant do have and recover from plaintiff, his costs and disbursements herein, and such other and further relief, as pertains to equity and good conscience, and defendant in duty bound will ever pray.

JAS. A. FEE,
R. G. WHEELER,
Attorneys for Defendant.

STATE OF OREGON, }
County of Malheur, } *ss:*

I, I. H. Adams, being first duly sworn depose and say; I am the defendant in the above entitled suit I know the contents of the foregoing answer and believe, the same to be true,

I. H. ADAMS.

Subscribed and sworn to before me this 9th day of December, 1896.

[County Court Seal.]

C. W. PLATT,
County Clerk.

"EXHIBIT A."

31 Articles of agreement, made and entered into at La Grande Oregon, this 17th day of November A. D. 1885, between Robert M. Steel of St. Johns, Michigan, of the first part, and I. H. Adams, of Baker county, Oregon of the second part,

Witnesseth, that it is mutually agreed by and between said —, to enter into a partnership, and they do hereby enter into a partnership, under the style and firm name of Steel and Adams, for the purpose of carrying on the business of farming and stock raising, in the county of Baker, in the State of Oregon, which said partnership under this agreement shall begin, on or before the first day of December A. D. 1885, and shall continue for ten years unless sooner dissolved.

That the party of the first part undertakes and agrees, on his part to pay into said firm as his part and share of the capital stock of said company, the sum of ten thousand dollars ($10,000) which said sum shall be paid in and by the date herein agreed, upon when said partnership is to begin, and the same shall remain invested in said business, during the continuance of said partnership without interest, that the party of the second part undertakes and agrees, to furnish as his part of the capital stock of said company against the ten thousand dollars ($10,000) to be paid in by the party of the first part, the labor and services, care and attention, of himself and family in the conducting, prosecution and management, of said busi-

ness of said partnership, and the said party of the second part undertakes and agrees, that the labor services care and attention, of himself and family, shall be given and bestowed upon the said business, of the said company with diligence, and that he will use every effort to advance the business interests, of said company and protect it from loss.

32 That all the labor which may be from time to time required in said business, beyond what can be reasonably applied, by party of the second part, and his family shall be paid for by the company.

That all supplies for the support of the table, of the party of the second part, with lights for the house, are to be furnished by the company, and all employees of the company shall be boarded by the party of the second part, without charge to the company.

That the products of the farm not needed for the use of stock, or supply of the family table, of party of the *party of the* second part, shall be disposed of to the best advantage, for the benefit of the company, and accounted for thereto, and all stock when suitable for the market may likewise, be disposed of, for company account, and accounted for in like manner.

Correct and accurate books of account shall be kept in which shall be entered under proper heading and dated, all the transactions of business by and with said company, which said books shall be at all times open to the inspection of the parties hereto or their duly appointed agents. At the end of the ten years herein stipulated, as the life of said partnership or sooner, if the same be sooner dissolved, the ten thousand dollars ($10,000) to be paid in by the party of the first part, shall be returned to him without interest, and the profits after defraying all expenses, and paying all debts and liabilities, then owing by the said firm, shall be divided between the parties hereto, share and share alike, and all losses shall be equally bourn- by the parties hereto, share and share alike.

In testimony whereof the said parties have hereunto set their names the day and year first above written and have executed this agreement in duplicate.

ROBERT M. STEEL.
I. H. ADAMS.

Signed sealed and delivered in the presence of:

GEO. A. STEEL.
J. B. KEISER.

(Exhibit A.)

33 In the circuit court of the State of Oregon for Malheur county, R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Answer Filed December 9th 1896. C. W. Platt, county clerk. James A. Fee, R. G. Wheeler, defendant's attorneys.

34 And afterwards, on the 12th day of December, 1896, the plaintiff filed with the said clerk his

Reply

in words and figures as follows:

In the Circuit Court of the State of Oregon for the County of Malheur.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

Comes now the plaintiff and for reply to the answer herein,

Denies that the personal property mentioned in plaintiff's complaint, is of the reasonable or other or any aggregate value, of $35,000 or any greater sum than mentioned and plead in plaintiff's complaint, nor can the same be now sold for any greater sum in the aggregate than that plead, in the complaint as its value,

Denies that the said partnership or the said business of said firm cannot be wound up or settled, or that the firm assets disposed of for less than their actual value in a less period than two years, but alleges the fact to be that the said partnership can be wound up and settled, and said firm assets disposed of in this suit as alleged in the complaint,

Denies that all the supplies for the support of the table of defendant, or lights for house, should be furnished by said company,
35 or that all or any of the employees, of said *employees* after the, or any, supplies should be furnished as aforesaid, or at all, *or* should be boarded by the said defendant, with charge to said company, or in any other manner except as plead in the complaint, and as set out in copy of said articles of partnership referred to.

Denies that it was or is as much the or any duty of the plaintiff to keep such books or accounts and entries, in said agreement provided for relating, to the business transactions of or with said company, or that as it was and is of defendant, but alleges that it was the bounden duty of the defendant, in charge of the property to keep such full and accurate accounts, as alleged in said agreement of copartnership.

Denies that under or pursuant to the terms of said agreement, of copartnership or at all, that plaintiff advanced the said sum of ten thousand dollars, at various or other times to said firm, the same being his part of the capital furnished, for said business under said agreement, but alleges that he furnished said sum as plead in the complaint, and as set out in said agreement.

Denies that said $10,000 plaintiff's capital in said partnership, and said other sums of money advanced by said plaintiff, for or on behalf of said copartnership, do not exceed in the aggregate the

sum of $18,000.00, but plaintiff alleges that his said advancement-, were and are the sum and amounts as plead in his complaint.

Denies that at various or other or any times or time, since the formation of said co-partnership, plaintiff has received large or any amounts or number of horses or cattle, or money or checks, or script or bacon or honey, or labor of horses or use of machinery, or tools belonging to the said copartnership, or labor or services of
36 men employed by said partnership or the same or any part thereof, or the labor or any labor or services of the defendant or his wife, or of any thing or at all of the reasonable or other or aggregate value of $42,500.00 or any other sum or any thing or at all, or that in 1886 or any other year, or in the month of April or any other month, plaintiff received one or any number of horses, the property of said firm, or agreed to pay said partnership therefor, the sum of $75.00 or any other sum, or that during said or any year, plaintiff received in checks or in any check, the sum of $500.00 or any other sum the property of said firm, or that in 1888 or any other year, or about the month of April or any other month, plaintiff received $500.00 in cash, or any other sum, the property of said firm, or that said or any time, plaintiff received $111.00 in county script, or any other sum or amount, of any script of Baker county, Oregon, or of any other county, the property of said firm, or that in 1889, or any other year, or in the month of August or any other month plaintiff received 96 or any other number of *of* head of horses, or any horse or horses, the property of said partnership, or that at said time or any time, no price was agreed upon for the said or any horses, or that there after plaintiff agreed to pay the said partnership said or any other sum for said or any horses, or should be charged therewith the sum of $6,000 or any other sum, or that in 1893 or in any other year, or in the month of April or any other month, plaintiff received 220 [220] head of beef or any cattle, or any number of, or any beef or other cattle, of said copartnership, or sold the same or received therefrom, the sum of $10,000 or any other sum, or that the exact or any amount was or is unknown, to the defendant, or that in said year or any other year, or about the month of October or any other month, said plaintiff
37 received 42 or any head of horses, the property of said co-partnership, or agreed to pay therefor the sum of $65.00 per head, or at all, or any other sum or at all, or that in the year 1895, or any other year, or in the month of March thereof or any other month, the plaintiff shipped or sold 353 or any other number of head of beef or other steers, the property of said co-partnership, or received the funds arising from the said or any sale, in the amount of $20,000 or any other sum or amount, or that the amount of said or any sale was or is unknown, to said defendant, or that during the year 1892 or of any other year, plaintiff received one or any pump or pipe the property of said co-partnership, of the reasonable or other value of $25.00 or any other sum, or that during the said or any year plaintiff used one or any span of work or other, or any, horses, for his own private use or benefit, either for 100 or any number of

days, said horse or horses being the property of said firm, or that the services thereof or any services, for said or any time, was or is of the reasonable or other value of $100 or any other sum, but plaintiff alleges that all of the firm property of every description coming into his hands, and of every transaction by him involving firm property, was for the use and benefit of said copartnership, in the usual course of business, and of which said partnership got the full benefit, and that he fully accounted to said firm therefor, and constitutes no part of the money advanced by plaintiff, as alleged in the complaint.

Denies that the said copartnership by its labor, or that of its horses, machinery men or services, enriched or improved plaintiff's land as alleged in defendant's answer, in the reasonable or other value of $750.00, or any other sum except, as follows, that the said co-partnership during the time mentioned, in said answer
38 used said land for its benefit and remuneration, and that the use and income from said land more than paid, said partnership for its said cultivation, and improvements, and that this plaintiff has never received any individual benefit therefrom.

Denies that in the year 1894 or any other year, plaintiff received from said firm of Steel and Adams, a large or any amount of bacon or honey the property of said firm, of the reasonable or other value of $325.00 or any other sum, or that in 1896 or any other year, plaintiff received a large or any amount of money, from said firm of the reasonable or other value, of $100.00 or any other sum, or that plaintiff has never accounted to or with the defendant, for the said bacon or any bacon or the said or any honey, but plaintiff alleges that all of his transactions with the property and business of the said co-partnership of every description, was done in the *ours* course of partnership business for said copartnership, and that all the proceeds thereof went to said copartnership, for its use and benefit, and that plaintiff fully accounted therefor to said co-partnership, and defendant, save the business and transaction of loaning said copartnership, the various sums of money set out in the complaint as an individual, and that none of his transactions with the firm property, had or have anything to do with, the sum so advanced for and loaned, said firm as alleged in the said complaint.

Denies that defendan- fully kept or performed the terms and conditions of his said agreement, of co-partnership upon his part to be kept and performed, so agreed in said articles of copartner-
39 ship so far as within his power so to do, but alleges that he has attempted to obtain from said firm, and has charged the said firm for alleged wages, of one Ernest Adams, a member of defendant's family, to a large sum the exact amount to plaintiff unknown.

Admits that said copartnership or firm purchased a large number of brood mares and fine well bred horses, and that as horses began to decline in price, and that it is now almost impossible to sell the same, for one half of their cost, and at great loss, but alleges that defendant could have disposed of the same, with proper diligence

without any great loss, or sacrefice, but at prices greater than can be obtained at the present time.

Denies that the said personal property of said firm and as set out in defendant's answer, together with the real property of said firm, of the reasonable or other aggregate value of $45,000 or any other sum greater than that set out in the complaint, or that the amount of land belonging to said firm, is only the alleged 480 acres, but alleges that the number of acres of land belonging to said firm, is as set out in the complaint, denies that if a receiver is put in charge of said property, that he will incur great or any unnecessary expense, in managing, selling or disposing of the same, or that defendant will be greatly or at all injured by the appointment of a receiver to take charge of said property and manage and conduct the same, under the orders of this court, and denies that the defendant can manage and control said property at any less expense than
40 a receiver appointed by this court, but alleges as in this complaint.

Denies that the land described and set out in defendant's answer in section 14 and 15, known as the Home place on Willow creek, or "Horse ranch" amounting to some 500 acres, has the title in plaintiff, or that plaintiff has any title thereto, but alleges the fact to be that said real estate is claimed, as road land, as belonging or claimed by a certain corporation, called the Road Company, but whose claim and title is contested by the firm of Steel and Adams, and really belongs to them, and plaintiff alleges that *be* defendant's neglegence, in not profiding for and paying the taxes thereon, that the same has been sold for taxes due the county of Malheur, and that unless the receiver redeems the said land from said tax sale, at once, the firm will lose all right and title thereto, and the same will go to tax deed, to the purchaser under the tax sale, denies that plaintiff has promised to convey to defendant a half interest herein, or has taken title to the said lands or any part thereof, in his own name, but is willing that said land shall be redeemed from tax sale, in the title inure to the benefit of said firm,

Denies that books or papers or bills or receipts, or vouchers relating to the business transactions, between the plaintiff and defendant as co-partners have all or in part been taken possession of by the plaintiff, or are still in his possession, or under his control, or that he has been often or at all requested, to return the same to the place of business of said firm, or has failed or neglected to return the same or any part thereof, except such papers as was necessary in the transaction of business for the partnership by plaintiff, and which rightfully belongs to others.

41 Denies that the defendant filed upon the W. ½ of the S. E. ¼ and E. ½ of the S. W. ¼ of section 24 tp. 18 south range 45 E. W. M. under the timber culture act of the United States, except as alleged in the complaint; and that plaintiff alleges that the said filing and said land has been maintained and improved by the partnership and for partnership purposes, and as alleged in the complaint, and that plaintiff denies that the crops of hay or grain upon said land

far or at all exceed in value the improvements placed thereon, by the defendant out of the partnership funds, denies that the title to the said land is still in the United States, except as follows: That final proof hereof was duly made on or about June 1896, duly accepted by the General Land Office, and that said land is subject to sale conveyance or partition by or between plaintiff and defendant, and that all that remains on the part of the United States, is the issuance of patent therefor, and denies that the said land is the separate or individual property of this defendant, but alleges that the same belongs to said partnership, and alleges as in the complaint,

And alleges further that plaintiff advanced money of his own, and permitted the use of partnership funds, in the improvement of said alleged timber culture claim, with the understanding and agreement on the part of the defendant, that the same should constitute partnership land, and should inure to the benefit of said co-partnership, and that defendant is now estopped from alleging or claiming the said land as and *is* his individual property.

Denies that on or about the first day of January 1886 or at any other time, defendant furnished the said partnership
42 money or property in the aggregate amount of $600.00 or any other sum, or that said firm never repaid said defendant, said sum or any part thereof, or that the same is still invested in said business in whole or in part,

Denies that in the month of October 1893, or at any time, at St. Johns, in the State of Michigan, or at any other place the defendant either at the instance or request of plaintiff or at all, executed or delivered to plaintiff, or any other person, as an accom-odation or without consideration therefor, his certain promissory note for the sum of $1500.00 or any other sum, or that the same is outstanding or unpaid or that defendant is in danger of any loss or trouble, or payment thereof, or in whole or in part or at all.

Wherefore this plaintiff prays as in his complaint.

C. H. FINN,
Plaintiff's Attorney.

STATE OF OREGON, }
County of Malheur, } ss:

I C. H. Finn, being first duly sworn say, that I am the attorney of the plaintiff in the foregoing and above entitled suit and court, and that the foregoing reply is true as I verily believe, that the reason I make this affidavit is because the plaintiff is not within the county of Malheur or State of Oregon and unable to make the same.

C. H. FINN.

Subscribed and sworn to before me this 12th day of December A. D. 1896.

C. W. PLATT,
County Clerk.

[COUNTY SEAL.]

43 In the circuit court of the State of Oregon, for Malheur county. R. M. Steel,—plaintiff. *vs.* I. H. Adams,—defendant. Reply Filed Dec. 12th 1896. C. W. Platt, clerk C. H. Finn, attorney for pl'ff.

44 And afterwards on the 6th day of December, 1897, there was filed in the office of the said clerk, a

Motion

in words as follows:

In the Circuit Court of the State of Oregon for Malheur County.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

Comes now C. H. Finn, the attorney of record, of and for the above named plaintiff and represents to and informs the court here, that since the last term of this court, that said plaintiff R. M. Steel, died at St Johns, Michigan, Notice of which fact has been given the undersigned

That said decedent left at his death estate in Union county, Oregon, and that J. W. Church has been duly appointed by the county court of said Union county, Oregon, administrator of the estate of said R. M. Steel dec'd who has duly qualified as such administrator. Certified copy of his letters being filed with the clerk of this court.

Motion is hereby made that said administrator be substituted in place of said decedent as plaintiff in this case for further proceedings.

C. H. FINN,
Pl'ff's Attorney.

45 In the circuit court of the State of Oregon, for Malheur county. R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Motion to substitute administrator, the plaintiff of deceased plaintiff. Filed Dec 6th, 1897. C. W. Platt, county clerk. C. H. Finn, attorney for plaintiff.

46 And afterwards on the 6th day of December, 1897, it being the first day of the regular term of said court, the court made the following

Order to Substitute.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

And now at this time this cause came regularly on to be heard, upon motion and application for substitution of party plaintiff, and

it appearing to the court here that since the commencement of this suit, and the last term of this court that the plaintiff has died and that this suit involves matters which survives his death and it can be further maintained in this court, and that J. W. Church has been appointed as and is the qualified administrator of the estate of said deceased plaintiff,

It is therefore ordered that said motion and application be substituted and that J. M. Church, administrator of the estate of R. M. Steel, deceased, be and he is as such administrator substituted as plaintiff in place of said R. M. Steel, deceased, and that this suit proceed in his name as such administrator, as plaintiff herein.

47 In the circuit court of the State of Oregon for Malheur county. Journal entry. R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Filed Dec. 6th, 1897. C. W. Platt, county clerk.

48 And afterwards on the 5th day of October 1899, the same being the fourth judicial day of the regular October term of said court, the court made the following

Findings of Fact and Conclusions of Law and Decree.

In the Circuit Court of the State of Oregon for Malheur County.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

Now on this day this cause coming on for decision, the same having been heretofore argued and submitted and the court having read the pleadings and proofs, and the arguments of counsel for the respective parties, hereto, makes and finds the following findings of fact and conclusions of law.

Findings of Fact.

1. The court finds that this cause was commenced in the above entitled court on the 18th day of September 1896, and that plaintiffs' complain- on file herein prays for an accounting and dissolution of co-partnership. That after the filing of the said complaint the plaintiff died, and J. M. Church was appointed his administrator, in the State of Oregon, and thereafter substituted as plaintiff in said suit.

2. That on the 17th day of November 1885 R. M. Steel and I. H. Adams entered into a written agreement, of co-partnership, to carry on a farming and stock raising business, in Malheur county, Oregon,

and to share equally in the profits and expense of the said
49 business. That the plaintiff R. M. Steel, was to advance the sum of $10,000 in money as his share of the capital of the said firm, and I. H. Adams was to furnish the labor, services, of himself and family, in conducting and managing said business. That all of the labor should be paid out of the partnership funds. That all supplies for the support of the table of the said I. H. Adams, with necessary lights for the house should be furnished by said company. That correct and accurate books of account should be kept, of all business transactions, which should always be open for the inspection of each of the parties or their duly appointed agents, and at the expiration of the time limited by said agreement, the said $10,000 should be returned to the said R. M. Steel, after the payment of all debts and expenses.

3. That at the time said agreement was entered into as hereinbefore stated, the family of I. H. Adams, consisted of wife, a minor son, Ernest Adams. That said R. M. Steel well knew that said Earnest Adams was a minor, and entered into said contract with full notice and knowledge of that fact.

4. That said Earnest Adams during his minority for several years labored earnestly for said firm under said contract and faithfully performed the duties assigned him without compensaaion until he attained his said majority. That thereafter the said I. H. Adams, had no further control over the said Earnest Adams, and he thereupon commenced working for himself, and was employed and paid for his services, by said firm with the full knowledge and consent, of the said R. M. Steel.

50 5. That the wife of the defendant worked and labored for the benefit of the said firm and faithfully and honestly discharged all the duties, assigned her without any remuneration, whatever during the said ten years limited by the said contract.

6. That at the time the said copartnership was formed I. H. Adams was indebted to the said R. M. Steel, in the sum of about $9000.00 and the said R. M. Steel purchased from the said I. H. Adams, certain personal property which he furnished said partnership in lieu of the said $10,000 which he had agreed to furnish in money, said personal property being of the value of $11600.00.

7. That the said co-partnership never owned the W. ½ of the S. E. ¼ and the east half of the S. W. ¼ of section 24 in township 18 south of range 45 E. W. M. and known as the I. H. Adams timber culture entry, that being the individual property of the said I. H. Adams, and never purchased by said firm, and never put into the said partnership as a part of the assets thereof.

8. That the co-partnership never owned the E. ½ of the S. W. ¼ and the W. ½ of the N. W. ¼, of section 24 township 18 south range 45 E. W. M. the same being known as the Weaver place, that said Weaver place was not purchased with funds of the said co-partnership, but with the private funds of Mrs. I. H. Adams, And the household furniture of the said Steel and Adams ranch, 60 chickens and 10 hives of bees belong to the said Mrs. I. H. Adams,

9. That said co-partnership leased the said premises from said Mrs. I. H. Adams, and agreed to pay for the use thereof whatever improvements they should place thereon and the interest upon
51 a mortgage of $500.00 on said land each year as well as the taxes against the said property.

10. That the said co-partnership received the crops from the said land, from the date of its purchase by the said Mrs. I. H. Adams, until the year 1897, and during the years 1895 and 1896, the said co-partnership and the receiver now in charge of the property of said partnership received the crops from the said land, but failed and neglected to pay the taxes thereon for said years 1895 and 1896.

11. That said co-partnership place- some improvements on the timber culture hereinbefore mentioned during the existance of said co-partnership, and also placed some improvements on what is known as the Walters place, the said Walters place being the individual property of said R. M. Steel.

12. That the improvements made on the said Walters place, and the rents issues and profits received from the said timber culture, by the said firm during its existance, equal and offset the improvements made on the said timber culture by the said partnership.

13. That George A. Steel the son of R. M. Steel, was the duly authorized agent of said R. M. Steel, in keeping books and accounts, and in taking papers receipts and vouchers connected with the said business.

14. That many of the accounts kept by the said firm are in the hand writing of said George A. Steel, and about 90 per cent. of the books papers and vouchers, have come from his possession that have been introduced in this case.

15. That said George A. Steel always had a thorough and complete knowledge of the condition of the accounts of the said firm as shown by the books and papers on file herein.

52 16. That when the property was sold by the said firm, which said R. M. Steel, received the money, the said George A. Steel, invariably failed to give the firm credit therefor, or to charge the said R. M. Steel therewith.

17. That the said I. H. Adams, during the time the said co-partnership was in existance frequently asked the said George A. Steel for an account of the indebtidness of the said firm, said indebtidness being well known to the said George A. Steel, and said R. M. Steel, but not to the said I. H. Adams, but said Geo. A. Steel neglected to furnish the said I. H. Adams any such statement, however in the summer of 1895 he made a verbal statement at the ranch of Steel and Adams in Malheur county, to the effect that the total indebtidness of the said firm at said time did not exceed the sum of $42,000.00 and which was true, that after the making of said verbal statement by said George A. Steel, the said firm contracted but a small amount of indebtidness, and said time a large amount of valuable real and personal property in Malheur county, sufficient to have paid said indebtidness, belonged to said firm.

18. That said I. H. Adams furnished to said George A. Steel, all

the necessary books / memoranda and data, to enable him to keep the books of accounts, connected with said partnership which came into the possession of the said I. H. Adams, the most of which said memoranda and data the said Geo. A. Steel took into his possession and away from the ranch of said firm.

18. That said firm at the commenc-ment of this suit owned the following property: The E. ½ of the S. E. ¼, and E. ½ of the N. E. ¼ of section 24 tp. 18 south, range 45 E. W. M.

53	Valued at	$8000.00
	The Cruson place, valued at	1000.00
	The Willow Creek ranch, valued at	350.00
	The Miller place, valued at	800.00
	1200 head of horses, valued at	18000.00
	Cattle to the value of	1200.00
	Hogs to the value of	700.00
	10 stallions, value of	2000.00
	Bees and stands to the value of	700.00
	Farm machinery to the value of	500.00
	Blacksmith tools to the value of	50.00
	Harness to the value of	200.00
	Grain to the value of	1000.00
	Honey and vinegar to the value of	400.00
	Hay to the value of	4800.00
	Nevada ditch stock, the value of	12800.00
	Work and saddle horses, the value of	1000.00
	Jacks to the value of	300.00

20. That at the time said copartnership was formed, said I. H. Adams was indebted to said R. M. Steel, in the sum of about $9000.00, that the said R. M. Steel purchased $11601.00 worth of property from said I. H. Adams, in payment of said claim, and after getting said property, caused the said I. H. Adams to make his notes to said R. M. Steel for said sum, two of said notes being for about $10,000, and one being for $1800 $200 represented by said promissory note being for money that was borrowed by the said firm to make proof on what is known as the Home place of said firm, that said $1800 note has ever since been held by said Steel and is the note mentioned by said George A. Steel, in his deposition herein, but that each and all of said notes were without consideration, personal to I. H. Adams.

54 21. That said R. M. Steel made most of the purchases of property for said firm of Steel and Adams, and paid the purchase price therefor where large investments were made by said firm during its existence.

22. That said R. M. Steel made most of the sales of personal property where large sums of money were to be received from the property of said firm and received the money therefor.

23. That said R. M. Steel was connected and closely identified with the interests of the Oregon Construction Company, the Oregon

Commercial Company, R. M. Steel and Company, and the Island City bank, and was interested in the finance-ering of each and all of said concerns, and most of the business of the firm of Steel and Adams, that was done during the existance of said copartnership, was done through said companies and said bank.

24. That said R. M. Steel made the settlement with said companies, on account of said partnership transactions, and with the said bank, and caused large sums to be transferred from and to his own account, and from and to the said companies, and from the said companies to the said bank, and at all of said times said George A. Steel, knew the exact condition of the accounts, of said firm of Steel and Adams, and with each and all of said institutions.

25. That large amounts of interest have been charged in said account against said firm of Steel and Adams, on account of notes due from said firm, and proper credits have not been made for interest due upon payments, upon the said accounts and notes.

26. That large sums of money were received by said R. M. Steel, which have not been credited on the account as presented in the findings of fact filed herein, by plaintiff's attorney.

55 27. That when the said co-partnership first commenced doing business as a firm, the prices paid for stock in the market, was high, and owing to depression in the markets the stock raised by said firm and owned by it at the commencement of this suit greatly depreciated in value.

28. That upon a fair and equitable accounting between the parties hereto, the assets of said firm about equal its liabilities.

29. That said I. H. Adams never knew and was never in a position to know the exact condition of the accounts of said firm.

30. That neither said I. H. Adams, his wife, or son, were competant to keep the books of said firm, all of which were known to said R. M. Steel, at the time said articles of co-partnership were filed, and no provision was made by said firm for the employment of a book keeper.

Conclusions of Law.

First. That said firm ought to be dissolved, that the defendant I. H. Adams is the legal and equitable owner of the west ½ of the S. E. ¼ and the east ½ of the S. W. ¼ of sec. 24, tp. 18 south range 45 E. W. M. and said firm has no interest therein.

Second. That Lizzie Adams is the legal and equitable owner of the W. ½ of the N. W. ¼, and the W. ½ of the S. W. ¼, of section 24 township 18 south range 45 E. W. M. and said firm has no interest therein, that she also owns the household furniture on said Steel and Adams ranch, at the commencement of this suit, 60 chickens and 10 hives of bees.

That all of the other property belonging to said firm should be turned over to said R. M. Steel in full payment and satis-

56 faction of all claims, and demands he or his estate or administrator, may have or hold against the firm, but out of the said property all the indebtedness due to the creditors of said firm,

must be paid together with the costs and disbursements of this suit, except that defendant must pay his own witness and attorney fees, and said R. M. Steel and his estate shall take the remainder of said property, in payment and satisfaction of his and its claim or claims, after the payment and satisfaction of the other debts of said firm, including the costs and disbursements of this suit as aforesaid, but said costs and disbursements shall be made a first lien upon said property, and the receiver heretofore appointed by this court should pay the same forth with out of the assets in his hands.

Dated this 5th day of October 1899.

MORTON D. CLIFFORD,
Circuit Judge.

And the court being fully advised in the premises it is hereby ordered adjudged and decreed, that the co-partnership heretofore existing between R. M. Steel and I. H. Adams, under the firm name of Steel and Adams be, and the same is hereby dissolved, and the injunction heretofore granted herein is also hereby dissolved.

It is further ordered adjudged and decreed that said defendant I. H. Adams, is the legal and equitable owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of sec. 24 tp. 18 S. R. 45 E. W. M. and that the said firm has — now and never has had any interest therein, that Lizzie Adams is the legal and equitable owner, of the W. ½ of the N. W. ¼, and the W. ½ of the S. W. ¼, of sec. 24 tp. 18 south range 45 E. W. M. and that said firm has not now and never has had any interest therein Also that she owns the
57 household furniture on the Steel and Adams ranch, at the commencement of this suit, 60 chickens, and 10 hives of bees.

It is further ordered adjudged and decreed that all the property in plaintiff's complaint mentioned other than that hereinbefore specified, is hereby turned over to R. M. Steel, and his administrator in full payment and satisfaction of all claims and demands, the estate of said R. M. Steel or his administrator, may have or hold against the said firm, but out of the said property both real and personal, all indebtedness due to the creditors out of the said firm, must first be paid, together with costs and disbursements of this suit, except that defendant must pay his own witness and attorney fees, herein, and the said costs and disbursements, are hereby declared to be a first lien upon said property, and the receiver heretofore appointed by this court is hereby ordered to forth with pay out of the funds, and property in his hands as such receiver, the costs and disbursements of this suit taxed at $369.50, and that he file his report herein as such receiver immediately.

That this decree is based upon the foregoing findings of fact and conclusions of law, and that they are each and all made a part hereof, and said receiver is hereby required and directed to pay the amount of the stenographer's bill, forth with herein, taxed at $188.00 and also $4.50 expressage.

MORTON D. CLIFFORD,
Circuit Judge.

58 In the circuit court of the State of Oregon for Malheur county. R. M. Steel, plaintiff *vs.* I. H. Adams, defendant. Findings of fact and conclusions of law and decree. Filed October 5th, 1899. A. G. King, county clerk.

59 And afterwards, on the 9th day of March, 1900, the plaintiff filed his

Notice of Appeal

in words and figures as follows:

In the Circuit Court of the State of Oregon for the County of Malheur.

J. M. CHURCH, Administrator, Substituted for R. M. Steel, Plaintiff,
vs.
I. H. ADAMS, Defendant.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

To I. H. Adams, defendant, and to R. G. Wheeler and J. A. Fee, your attorneys:

You will take notice that the above named plaintiff, hereby appeals, to the supreme court of Oregon, from the decree made and entered on the 5th day of October A. D. 1899, in the above entitled suit in the circuit court of the State of Oregon for the county of Malheur, generally in favor of the plaintiff and against the defendant, but the parts appealed from, being — favor of the defendant as against the plaintiff.

That the said plaintiff appeals:—

First. From all that portion of said decree, wherein it is recited that said defendant I. H. Adams is the legal and equitable
60 owner of the west half of the south west quarter, and the east half of the south west quarter of section twenty four (24) in township eighteen (18) south of range forty five (45) east Willamette meridian, and that the said firm has not now and never has had any interest therein;

Second. From all that portion of said decree wherein it is recited that Lizzie Adams is the legal and equitable owner of the west half of the north west quarter and the west half of the south west quarter of section twenty four (24) in township eighteen (18) south of range forty five (45) east Willamette meridian, and that said firm has not now and never has had any interest therein: also that she owns the hous-hold furniture at Steel and Adams ranch at the commencement of this suit, one hundred and sixty chickens and ten hives of bees.

Third. From all that portion of said decree wherein it is recited that it is further ordered adjudged and decreed, that all the property in plaintiff's complaint mentioned other than that hereinbefore specified is hereby turned over to R. M. Steel and his administrator, in full payment and satisfaction of all claims and demands, the estate of the said R. M. Steel or his administrator, may have or hold against the said firm,

Plaintiff appeals from said decree because the same is not full enough, together with the findings of fact and conclusions of law upon which the parts thereof herein appealed from, are based as well as such parts as are appealed from, are insufficient and contrary to law, and not supported by the evidence in said suit.

And plaintiff appeals from the whole of said decree wherein it attempts to provide that any part of said lands or property in
61 controversy belongs or ever did belong to either I. H. Adams, or Lizzie Adams, or that any of said property should pay in full, the claims of said R. M. Steel, his estate or administrators.

C. H. FINN,
Attorney for Plaintiff.

Dated March 5th, 1900.

62 Original. In circuit court, Malheur county, Oregon. J. M. Church, administrator, substituted for R. M. Steel, plaintiff, *vs.* I. H. Adams, defendant. Notice of appeal. Filed March 9th, 1900. A. G. King, clerk. C. H. Finn, attorney at law, La Grande, Oregon.

63 And afterwards on the 14th day of March 1900, there was filed in the office of the said clerk an

Undertaking on Appeal

in words and figures as follows to wit:

In the Circuit Court of the State of Oregon for Malheur County.

J. M. CHURCH, Administrator, Substituted for R. M. Steel, Plaintiff,
vs.
I. H. ADAMS, Defendant.

R. M. STEEL, Plaintiff,
vs.
I. H. ADAMS, Defendant.

Undertaking on appeal.

Whereas the plaintiff in the above entitled suit, has appealed to the supreme court of the State of Oregon, from a portion of judgment and decree made and entered, in said above entitled suit, in the said circuit court, on the 5th day of October A. D. 1899.

Now therefore in consideration of the premises, and of such appeal, the said J. M. Church, administrator, substituted for R. M. Steel *ect.* as principal, and J. M. Berry as surety, do hereby jointly and severally undertake, and promise on the part of the appel-ant, that the said appellant will pay all damages costs and disbursements, which may be awarded against said appellant, on the appeal.

Dated this the 12th day of March A. D. 1900.

J. M. CHURCH,
Administrator of R. M. Steel Estate, etc.
J. M. BERRY.

64 STATE OF OREGON, } ss:
County of Union, }

I, J. M. Berry the person named in, and who subscribed the foregoing undertaking, as the surety thereto, being duly sworn say, that I am worth the sum of one thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution, and am a resident and householder in said county and State of Oregon.

J. M. BERRY.

Subscribed and sworn to before me this 13th day of March, A. D. 1900.

F. L. MEYERS,
[N'T'R'L SEAL.] *Notary Public for Oregon.*

65 In the circuit court, Malheur county, Oregon. J. M. Church, adm'r, etc. substituted for R. M. Steel, p'l'ff, *vs.* I. H. Adams, defendant. Undertaking for appeal. Filed March 14th, 1900. A. G. King, clerk. C. H. Finn, attorney at law, La Grande, Oregon, attorney for plaintiff.

66 And thereafter to wit: on the first day of October, 1900, there was filed in the office of the said clerk the

Mandate of the Supeme Court of the State of Oregon

in words and figures as follows to wit:

Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday the 5th day of March 1900, present: Hon. Robert S. Bean, chief justice,; Hon. Frank A. Moore, associate justice, Hon. Charles E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Monday the 2nd day of July 1900, the same being the 47th judicial day of said term :

J. M. CHURCH, Administrator of the Estate of R. M. Steel, Deceased, Substituted for R. M. Steel, Appellant,
vs.
I. H. ADAMS, Respondent.
} Appeal from Malheur County.

This cause having been heretofore to wit: on the 16th day of May 1900 *been* argued and submitted by the attorneys of the respective parties, above named and by the court then reserved for further consideration, and the court having duly considered all the questions, presented by the transcript herein, and the evidence relating to the portion of the decree appealed from, and the arguments of the respective attorneys thereon, and being now fully advised in the premises, finds that there is not error as alleged, except wherein it is decreed, that the respondent is the legal and equitable owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of section 24 tp. 18 S. range 45 E. of W. M. known as the timber culture claim, and that the firm of Steel and Adams never had any
67 interest therein.

It is therefore considered ordered and decreed, that the portion of the decree of the court below appealed from, be and the same is hereby in all things affirmed with said exception.

And it appearing to the court and the court further finds, that of the two tracts of real property involved in the appeal herein, known as the Weaver place and the Adams timber culture entry, the said Weaver tract was not included in the sale of property made by the said Adams, respondent, to the said firm of Steel and Adams, mentioned in the pleadings nor was it purchased with the funds of said firm.

And the court further finds that the said Adams timber culture tract, was included in the said sale by the respondent to the said firm,

And as conclusions of law from the foregoing facts, the court further finds that the said firm of Steel and Adams, was not at the commencement of this suit the owner, of said Weaver place, particularly described as the W. ½ of the S. W. qr. and the W. ½ of the N. W. qr. of section 24 tp. 18 S. of range 45 E. of the W. M. in Malheur county, Oregon.

That at the commencement of this suit the said firm of Steel and Adams, owned the tract known as the Adams timber culture entry, more particularly described as the W. ½ of the S. E. qr. and the E. ½ of the S. W. qr. of sec. 24 tp. 18 S. of range 45 E. of the W. M. in Malheur county, Oregon.

It is now therefore further ordered and decreed that the said firm of Steel and Adams, is the owner of the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of sec. 24 tp. 18 S. range 45 E. of the W. M. in Malheur county, Oregon, and that the respondent has no interest therein except as a member of said firm.

68 It is further ordered and decreed that the said firm of Steel and Adams, is not the owner of the W. ½ of the S. W. ¼, or the

W. ½ of the N. W. ¼, of sec. 24 tp. 18 S. of range 45 E. of the W. M. in Malheur county, Oregon, known as the Weaver place, nor any part thereof.

And in accordance with the decree of the court below not appealed from, it is further ordered and decreed that the co-partnership heretofore existing between R. M. Steel and I. H. Adams, under the firm name of Steel and Adams, be and the same is hereby dissolved, and the injunction heretofore granted herein is also dissolved.

That all the property in the complaint mentioned other than that hereinbefore specified is hereby turned over to R. M. Steel, and his administrator, in full payment and satisfaction of all claims, and demands the estate of the said R. M. Steel, or his administrator may have or hold against the said firm, but out of the said property both real and personal, all indebtidness due to creditors from the said firm, must first be paid together with costs and disbursements of this suit in the circuit court, except that the respondent must pay his own witness and attorney's fees, and the said costs and disbursements are hereby declared to be a first lien upon said property, and the receiver heretofore appointed by the court below, is hereby ordered to forthwith pay out of the funds and property in his hands as such receiver, the costs and disbursements of this suit in said court below, there taxed at $369.50, and the stenographer's bill taxed in said court below at $188.00 and also $4.50 expressage.

It is further ordered and decreed that neither party recover
69 costs or disbursements in this court from the other.

It is further ordered that the cause be remanded to the said court below, and that a decree be there entered and docketed in accordance herewith.

STATE OF OREGON, } ss :
County of Marion, }

I J. J. Murphy, clerk of the supreme court of the State of Oregon do hereby certify that the foregoing transcript, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record, and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 26th day of July 1900.

J. J. MURPHY, *Clerk,*
[SEAL.] By J. W. REEVES, *Deputy.*

To the circuit court of the State of Oregon for the county of Malheur:

You are hereby commanded that of the above judgment order of our supreme court, you cause proper entry to be made upon the records of your court as of a judgment therein, and proceed
70 to final determination and execution thereof, as to the said order of our supreme court, and to law and justice shall appertain.

In witness whereof I have hereunto set my hand, and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 26th, day of July 1900.

J. J. MURPHY, *Clerk*,
[SEAL.] By J. W. REEVES, *Deputy*.

71 Equity No 75. In the supreme court of the State of Oregon. March term 1900 Church *vs.* Adams Mandate Filed Oct 1st, 1900. A. G. King, clerk.

72 And afterwards to wit, on the 8th day of October, 1900, the same being the seventh judicial day of the regular October term, of said court there was entered the following

Decree on the Mandate.

J. M. CHURCH, Administrator of the Estate of R. M. Steel, Deceased, Substituted for R. M. Steel, Appellant,
vs.
I. H. ADAMS, Respondent.

Now on this day this cause came on to be heard, on motion for judgment and decree, on the mandate, the appellant appearing by J. M. Carroll, his attorney, and moving therefor, and it appearing to the court that appeal was taken to the supreme court, from the decree of this court, heretofore made and entered herein, and that the decision upon appeal has been remitted to this court by mandate in words and figures as follows to wit:

Be it remembered that at a regular term of the supreme court of the State of Oregon begun and held at the court room in the city of Salem, on the first Monday the 5th day of March, 1900, present: Hon. Robert S. Bean, chief justice; Hon. Frank A. Moore, associate justice, Hon. Chas. E. Wolverton, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Monday the
73 2nd day of July, 1900, the same being the 47th judicial day of said term:

J. M. CHURCH, Administrator of the Estate of R. M. Steel, Deceased, Substituted for R. M. Steel, Appellant,
vs.
I. H. ADAMS, Respondent.
Appeal from Malheur County.

This cause having heretofore, to wit: on the 16th day of May, 1900, been argued and submitted by the attorneys of the respective parties above named, and by this court then reserved for further consideration, and the court having duly considered all the questions presented by the transcript herein and the evidence relating

to the portion of the decree appealed from, and the arguments of the respective attorneys thereon, and being now fully advised in the premises finds:

That there is not error as alleged, except wherein it is decreed that the respondent, is the legal and equitable owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of sec. 24 tp. 18, S. range 45 E. of W. M. known as the timber culture claim, and that the firm of Steel and Adams never had any interest therein.

It is therefore considered, ordered and decreed, that the portion of the decree of the court below appealed from, be and the same is hereby in all things affirmed with said exception.

And it appearing to the court and the court further finds, that of the two tracts of real property involved in the appeal herein, known as the Weaver place and the Adams timber culture entry, the said Weaver tract was not included in the sale of property made, by the said Adams, respondent, to the said firm of Steel and Adams, mentioned in the pleadings, nor was it purchased
74 with the funds of said firm.

And the court further finds that the said Adams timber culture tract, was included in the said sale by the respondent to the said firm.

And as conclusions of law from the foregoing facts the court further finds: That the said firm of Steel and Adams was not at the commencement of this suit the owner of said Weaver place, particularly described as the W. ½ of the S. W. ¼, and the W. ½ of the N. W. ¼ of sec. 24 tp. 18 S. R. 45 E. W. M. in Malheur county Oregon.

That at the commenc-ment of this suit the said firm of Steel and Adams, owned the tract known as the Adams timber culture entry more particularly described as the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼ of sec. 24 tp. 18 S. R. 45 E. of the W. M. in Malheur county, Oregon,

It is now therefore further ordered and decreed, that the said firm of Steel and Adams, is the owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of sec. 24 tp. 18 S. R. 45 E. of the W. M. in Malheur county, Oregon, and that the respondent has no interest therein except as a member of said firm.

It is further ordered and decreed that the said firm of Steel and Adams, is not the owner of the W. ½ of the S. W. ¼, and the W. ½ of the N. W. ¼, of sec. 24 tp. 18 S. R. 45 E. W. M. in Malheur county, Oregon, known as the Weaver place nor any part thereof.

And in accordance with the decree of the court below not appealed from, it is further ordered and decreed that the co-partnership heretofore existing, between R. M. Steel and I. H. Adams, under the firm name of Steel and Adams, be and the same is hereby dissolved, and the injunction heretofore granted herein is also dissolved,

That all the property in the complaint mentioned, other than that hereinbefore specified, is hereby turned over to R. M. Steel, and his administrator, in full payment and satisfaction of all claims, and demands the estate of the said R. M. Steel, or his administrator may

have or hold, against the said firm, but out of the said property both real and personal, all indebtidness due to creditors from said
75 firm must first be paid, together with costs and disbursements of this suit in the circuit court, except that the respondent must pay his own witness and attorney fees, and the said costs and disbursements hereby declared to be a first lien, upon said property, and the receiver heretofore appointed by the court below, is hereby ordered to forthwith pay out of the funds and property, in his *a*lnds as such receiver, the costs and disbursements of this suit in said court below, there taxed at $369.50, and the stenographer's bill, taxed in said court below, at $188.00, and also $4.50, expressage.

It is further ordered and decreed that neither party recover costs and disbursements, in this court from the other.

It is further ordered that the cause be remanded to the said court below, and that a decree be there entered and docketed, in accordance herewith.

STATE OF OREGON, }
County of Marion, } *ss:*

I J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appear of record, and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 26th, day of July 1900.

J. J. MURPHY, *Clerk,*
[SEAL.] By J. W. REEVES, *Deputy.*

76 To the circuit court of the State of Oregon for the county of Malheur:

You are hereby commanded that of the above judgment order of our supreme court, your cause proper entry to be made, upon the records of your court, as of a judgment therein, and proceed to final determination and execution thereof, as to the said order of our supreme court, and to law and justice shall appertain,

In witness whereof I have hereunto set my hand, and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 26th day of July, 1900.

J. J. MURPHY, *Clerk,*
[SEAL.] By J. W. REEVES, *Deputy.*

Now therefore in pursuance of said mandate it is hereby considered ordered and decreed, that the said firm of Steel and Adams, is the owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼, of section 24, tp. 18 S. R. 45 E. W. M. in Malheur county, Oregon, and that the respondent has no interest therein except as a member of said firm.

It is further ordered and decreed that the said firm of Steel and Adams, is not the owner of the W. ½ of the S. W. ¼, and the W. ½ of the N. W. ¼, of sec. 24 tp. 18 S. of range 45 E. of the W. M. in Malheur county, Oregon, known as the Weaver place, nor any part thereof, and in accordance with the decree of the court below not appealed from, it is further ordered and decreed, that the co-partnership heretofore existing, between R. M. Steel and I. H. Adams, under the firm name of Steel and Adams, be and the same is hereby dissolved, and the injunction heretofore granted herein, is also dissolved.

That all the property in the complaint mentioned, other than that hereinbefore specified, is hereby turned over to R. M.
77 Steel, and his administrator in full payment and satisfaction of all claims and demands of the estate of R. M. Steel, or his administrator, may have or hold against the said firm, but out of said property both real and personal, all indebtidness due to creditors from the said firm, must first be paid, together with costs and disbursements of this suit, in the circuit court, except that the respondent must pay his own witness and attorney fees, and the said costs and disbursements are hereby declared to be a first lien upon said property, and the receiver heretofore appointed by the court below, is hereby ordered to forthwith pay out of the funds and property in his hands, as such receiver, the costs and disbursements of this suit in the court below, there taxed at $369.50, and the stenographer's bill taxed in said court below, at $188.00, and also $4.50 expressage.

It is further ordered and decreed that neither party recover costs or disbursements in this court from the other.

MORTON D. CLIFFORD.
Circuit Judge.

78 J. M. CHURCH, Administrator of R. M. Steel, Deceased, Appellant,
vs.
I. H. ADAMS, Respondent.

Appeal from Malheur county; Hon. M. D. Clifford, judge.

C. H. Finn, for appellant.
J. A. Fee, for respondent.
Bean, J.
Modified.
Filed July 2, 1900.

J. J. MURPHY, *Clerk*,
By LEE MOORHOUSE, *Deputy*.

79 This is an appeal from part of a decree in a suit bought by plaintiff's intestate to dissolve a partnership and for an accounting. The only question for the consideration of this court is whether two tracts of land, known and referred to in the record as

the timber culture claim and the Weaver place, belong to and are part of the partnership assets.

On November 17, 1885, the plaintiff's intestate, R. M. Steel, and the defendant Adams entered into a partnership to continue for ten years, under the firm name and style of Steel & Adams, for the purpose of carrying on the business of farming and stock raising in Baker county. Under the terms of the partnership agreement, Steel was to, and did, advance to the partnership $10,000, to remain invested in the business during its continuance, in consideration of which Adams agreed to furnish the labor and services of himself and family in the prosecution and management of the business. At the time of the formation of the partneship, Adams was the owner of a preemption claim, consisting of 160 acres, and a timber culture filing on another quarter section, one-quarter interest in the Nevada ditch, and horses, cows, wagons and farming machinery. Immediately after the formation of the partnership, the firm purchased of Adams the property then owned by him, for $11,601, paying for it with the $10,000 advanced by Steel, and $1,601 loaned by him to the company on its demand note. The partnership continued the business until the expiration of the time limited in the articles of co-partnership, at which time, the parties being unable to settle their affairs, this suit was brought by Steel for a dissolution of the partnership and an accounting, pending which Steel died, and Church, having been appointed administrator of his estate, was substituted as plaintiff.

80 BEAN, *J.*:

The questions presented are, first, whether Adams' timber culture claim is part of the assets of the partnership. At the time of its formation, there were present and participating in the negotiations, R. M. Steel, his son, George A. Steel, and the defendant Adams, and upon the testimony of these three persons must the question be determined.

R. M. Steel, in referring to the matter, says, in answer to interrogatory No. 16: "Two thousand dollars of the amount furnished by me to the firm of Steel & Adams on November 18, 1885, which was paid to I. H. Adams immediately after coming into possession of the firm, was invested in land, that sum being paid for the east half of the northeast quarter and the east half of the southeast quarter of section twenty-four;" and in answer to interrogatory No. 17: "Two hundred dollars was paid for the improvements on the west half of the southeast quarter and the east half of the southwest quarter of same section, this sum being for improvements consisting of fifteen acres of clearing and five hundred trees, the title to the land being then in the United States, the defendant having entered same under the timber culture act. All subsequent improvements were to be made at the expense of the firm, including fees for making final proof, and when patent issued, defendant was to deed the land to the firm forthwith, without further consideration. * * * Defendant had no means at the time

articles of copartnership were entered into, except such property as he sold the firm, and all the moneys so received for said property were required and used to pay his indebtedness. I do not know of his having acquired any means in his own right since that time, as his time has been devoted to the care and management of the business of the firm without salary, the necessary wearing apparel for defendant and his family even having been purchased from
81 firm assets and advanced to defendant, no part of which advances have been reimbursed to the firm. I believe defendant claims now to own said timber culture in his own right, notwithstanding the fact that all his rights to same were purchased by the firm immediately after its organization, and that it always has been considered to be firm property. The subsequent improvements on the land were all made by the firm, and cost probably two or three thousand dollars."

George A. Steel, the confidential clerk and accountant of his father, took part in the negotiations leading to the formation of the partnership and has since been more or less familiar with its business. He says, in answer to interrogatory No. 16: "From the sum of $10,000 invested by plaintiff in accordance with the articles of copartnership, November 18, 1885, and the sum of $1,601 loaned by the plaintiff to the partnership on that date, which were invested at the same time, the sum of $2,000 was invested on the east half of the northeast quarter and the east half of the southeast quarter of section twenty-four;" and, in answer to interrogatory No. 17, says: Seventy-five dollars was advanced and paid to defendant for clearing the fifteen acres, and one hundred and twenty-five dollars was paid the defendant for trees set out and growing on the west half of the southeast quarter and the west half of the southwest quarter of said section twenty-four, which land belonged at that time to the Government, and which the defendant had entered under the timber culture act. It was agreed between the defendant and plaintiff that in consideration of the formation of the partnership and the purchase of property from the defendant, as contemplated thereby, and the payment of the sum of two hundred dollars above mentioned, together with the making of all subsequent improvements necessary to enable the defendant to make final proof upon said land, that the defendant was to
82 deed the said land to the firm as soon as he received the patent therefor. At the time of the formation of the partnership, and upon facts furnished from statements made to me by the defendant, I made up a schedule of all property owned or controlled by him at that time after he should have repurchased from the Oregon Construction Company certain freight teams fully equipped, which he had theretofore sold them, which said schedule, marked Exhibit D, is attached to the deposition of R. M. Steele in this case. The total amount of property, according to the valuation placed thereon by the defendant, amounted to the sum of $12,011. This valuation was afterwards reduced by agreement between plaintiff and defendant by the sum of $410, leaving the balance of the prop-

erty as agreed upon between plaintiff and defendant, $11,601, which sum was afterwards paid defendant by the firm for such property. * * * I know of no means acquired by the defendant in his own right since the formation of the partnership. The west half of the southeast quarter and the east half of the southwest quarter of said section twenty-four, known as the timber claim, has always been held, used and considered to be property belonging to the firm, and improvements thereon, which have been very extensive, have been made by the firm in such a manner as would not have been pursued with property not belonging to them. The cost of such improvements, considering the clearing, preparing for irrigation, by means of construction of wheels, pumps, windmills, water-wheels, flumes, ditches, setting out and growing of fruit trees and water therefor, would in my judgment amount to several thousand dollars. No detailed account of the expenditures in the way of labor on the above described land was ever reported or kept, nor were the other expenditures charged up to defendant's account, as would have been the case if it had been considered to be his individual property.

83 Upon the books of the firm the total investment in real estate is shown to be $400, the remaining $1800 of the total $2.200 allowed defendant for the east half of the northeast quarter and the east half of the southeast quarter, the west half of the southeast quarter and the west half of the southwest quarter of said section twenty-four being represented by note of the defendant to the firm, dated November 18th, 1885, due June 30, 1891, without interest, it being calculated that the defendant would have made final proof by this date upon the timber culture and he was then to deliver forthwith the deed of said land to the firm, without further consideration than the surrendering of the note in question. A memorandum was made by me at the time of the agreement between plaintiff and defendant, reading as follows: 'The attached note is to be cancelled at maturity by deed to timber claim; all improvements on which are to be done by Steel & Adams, without charge to I. H. Adams, consideration for 160 acres to be $1800." And this agreement has at all times since remained attached to the note and said note and agreement attached is appended to the deposition of R. M. Steel in this case, and marked Exhibits E and F." As explaining why Adams' note for $1,800 was taken by the firm, to be delivered and surrendered up when the timber culture claim should be deeded to it, and in explanation of the entry in the books in reference thereto, the witness says, in answer to cross-interrogatories 12 and 14: The memorandum of Adams' property and the value thereof, made as a basis for the formation of the partnership, " was used to form the basis of the entries on the books, and these prices are correct as agreed upon, with the exception of the valuation of the real estate and improvements on the timber culture, which are er-

84 roneous as they appear on the books and as testified to by me in answer to interrogatory No. 17 of the direct examination, the amount charged to bills receivable for I. H. Adams' note, dated

November 18th, 1885, $1,800, being in fact chargeable to real estate. The reason of this entry being made in this manner was that the defendant had not made final proof on the timber culture claim, and it was feared that the knowledge of the actual transaction between defendant and the firm of Steel & Adams, if entry was correctly made, might prevent the making of such final proof. * * * The amount agreed upon which I. H. Adams was to receive for the 160 acres of land owned by him in November, 1885, and his interest in the timber culture claim and improvements thereon, all subsequent improvements necessary to enable him to make final proof and all future expenses in connection therewith, to be made and paid for by the firm, who would then be entitled upon the issuing of the patent forthwith to the deed from I. H. Adams of the timber culture, was $2,200, but, owing to the fact that I. H. Adams had not made final proof of the timber culture claim, and for the reasons stated in answer to interrogatory No. 12, the price paid for the 160 acres of land is entered at $400, and no mention is made of the timber culture, while the difference of $1,800 between the amount of $400 mentioned and the valuation of $2,200 agreed upon for the 160 acres of land and timber culture, was charged to bills receivable, for I. H. Adams' note, dated November 18, 1885, for that amount, which said note was made to fall due in 1891 at a time when it was calculated that Mr. Adams would have made final proof upon the timber culture claim, and which he was then forthwith and without consideration except the surrender of the $1,800 note to deed to the firm of Steel & Adams." Upon the schedule of Adams' property
85 which the witness George A. Steel says he made up at the time of the formation of the partnership and its purchase of the property, and which was identified and introduced in evidence and marked Exhibit D, appears an item of seventy-five dollars for clearing fifteen acres of the timber claim, and one hundred and twenty-five dollars for trees planted thereon, which tends to corroborate the testimony of both R. M. and George A. Steel, as to the terms of the partnership agreement and the property purchased by it from Adams.

The testimony of the Steels in reference to this matter is contradicted by Adams, who testifies that he was to deed the pre-emption claim to the partnership for $2,000, but nothing was said about purchasing the timber claim or paying for the trees or clearing thereon, although both places were to be improved and worked together, that he never kept any account of the cost of the improvement made on the timber culture claim, but thinks it amounted to three or four thousand dollars; nor did he keep any account of the income therefrom, but it was treated as the property of the firm. The witness seems to rely principally upon his recollection of what occurred at the time of the formation of the partnership, and he is contradicted by R. M. and George A. Steel, whose testimony is corroborated by written memoranda made at the time. It is true the defendant offered in evidence what purports to be a list of his property at the time the partnership was entered into, which he insists is the sched-

ule upon which the purchase was made. It corresponds substantially in all particulars with Exhibit D, except that the items for clearing a portion of the timber claim and for 500 trees thereon, amounting in the aggregate to $200, are omitted from defendant's list, and instead thereof is an item of $200 for the potato crop thereon.

The testimony of the defendant shows that the list marked
86 Exhibit 9, was discovered among his papers after the commencement of this suit and is in the handwriting of George A. Steel. George A. Steel testifies that in his opinion it was made out, together with other statements, for the convenience of Mr. Adams, some time subsequent to, or perhaps prior, to the formation of the partnership, but that it was not considered when the partnership was formed, nor did it form the basis thereof. The witness says that during the negotiations looking to the formation of the partnership several lists of property owned by Adams, with different valuations, were made out, but he testifies that the list which formed the basis of the partnership is the one made out by him, introduced in evidence by the plaintiff, and marked Exhibit D, which contains the items of clearing the tree claim and the 500 trees; and, when the defendant's particular attention was called to Exhibit D, and he was asked if he was willing to swear that he did not see it at the time the partnership was formed, he said: "Well, I saw something of this kind, but I would not swear it was this one. This one seems to be made in pencil, and I don't remember whether that one was in writing, or not, or in pencil. There is no date to this. It was done ten years ago. Q. Are you willing to swear, Mr. Adams, that that wasn't made at your dictation at that time? A. I probably dictated the instrument that was made at that time, but I wouldn't swear to this one. No, sir; there is no signature to it that I could prove anything, or that could be identified positively." So that, upon the whole, we are of the opinion that the manifest weight of the testimony is in favor of the plaintiff's contention that it was understood and agreed at the time the partnership was formed that the timber culture claim should belong to and become a part of the assets of the firm, and be conveyed to it as soon as Adams should make final proof and acquire title from the Government.

87 It is argued, however, that such a contract is void as against public policy. In support of this position reliance is had upon a line of authorities holding that the courts will not enforce specific performance of a contract made by a homesteader to convey his claim after final proof: Clark *v.* Bayley, 5 Or. 343; Brake *v.* Ballou, 19 Kan. 397; Warren *v.* Van Brunt, 19 Wall., 646; Brewster *v.* Madden, 15 Kan. 249; Oaks *v.* Heaton, 44 Ia., 116; Anderson *v.* Carkins, 135 U. S. 483. The homestead law required the applicant to make an affidavit at the time of his entry that it "is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." U. S. Rev. St., par. 2290. And, on making his final proof, "that no part of such land has been alienated, except as provided in section 2288" (*Id.*

par. 2291), viz., "for church, cemetery or school purposes, or for the right of way of railroads." Under this provision of the Federal statute, it is held that, as a homestead claimant who has sold or contracted to sell his homestead, or a part thereof, cannot make final proof without perjuring himself, a contract to do so is against public policy and will not be enforced in a court of equity. But we are not directed to any such provision in the law governing timber culture claims, nor to any provision therein against alienation. It provides (20 U. S. St. at Large, 113 par. 2) that a person applying for the benefit of the act shall make affidavit at the time of his entry "that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of *of* this said act." And
88 the only provision in reference to final proof is that "the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre and that at the time of making such proof that there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre." We do not understand this provision to inhibit the timber culture claimant, who has made his entry in good faith, from contracting to sell his claim prior to the final proof; and the law seems to be so interpreted by the Land Department of the United States: Sims *v.* Bruse, 4 L. D. 369; United States *v.* Read, 5 L. D. 313.

So far as the Weaver place is concerned, the evidence shows that it was deeded to the defendant's wife by Weaver some time after the formation of the partnership of Steel & Adams, and there is no testimony except mere inferences, on behalf of the plaintiff, that it was purchased or paid for with the partnership funds. On the other hand, the defendant, his wife, and their son, all testify that it was purchased and paid for by Mrs. Adams with her own money, and this evidence is substantially uncontradicted. Moreover, Mrs. Adams is not a party to this suit, and, therefore, no decree could be made in any event which would be binding upon her.

The decree of the court below will be modified in accordance with these views.

89 STATE OF OREGON, } *88:*
Umatilla County, }

I, J. J. Murphy, clerk of the supreme court of the State of Oregon hereby certify that the foregoing copy of opinion in case of J. M. Church adm'r of R. M. Steel, deceased, appellant *vs.* I. H. Adams, respondent has been by me compared with the original thereof and

that it is a true and correct copy of such original and of the whole thereof as the same appears of record in my office and custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court at Pendleton Oregon this 17th day of November 1902.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of Oregon,
By LEE MOORHOUSE, *Dep'ty.*

90 STATE OF OREGON, } ss:
County of Malheur, }

I W. G. Thomson, county clerk of Malheur county, State of Oregon, and *ex-officio* clerk of the circuit court in and for said county and State, do hereby certify that the foregoing copy of complaint, demurrer to complaint, order overruling demurrer, answer, reply, motion to substiiute plaintiff, order granting motion, findings of facts and conclusions of law and decree, notice of appeal, undertaking on appeal, mandate, decree on mandate, extending from pages 1 to 77 inclusive, has been by me compared with the originals thereof, in the case wherein R. M. Steel is plaintiff, and I. H. Adams, is defendant, or wherein J. M. Church, substituted for R. M. Steel deceased, is plaintiff and I. H. Adams is defendant, and that it is a true and correct copy of said original papers, and of the whole thereof, together with the endorsements thereon, as the same appear on file in my office and now in my official care and custody.

In witness whereof I have hereunto set my hand and the seal of the circuit court of the State of Oregon for Malheur county, this the twenty-fourth day of November A. D. one thousand nine hundred and two.

[Seal Circuit Court, Malheur County, State of Oregon.]

W. G. THOMSON, *Clerk,*
By B. W. MULKEY, *Deputy.*

91 In the Supreme Court of the State of Oregon.

J. M. CHURCH, Administrator of the Estate of R. M. Steele, Deceased, Plaintiff,
vs.
I. H. ADAMS, Defendant. } Petition for Writ of Error.

To the honorable the chief justice of the supreme court of the State of Oregon:

I. H. Adams, the defendant in the above entitled suit, most respectfully represents and says; that, on the 8th day of October, A. D. 1900, a final decree and judgment in this suit was entered by the

circuit court of the State of Oregon for Malheur county, in accordance with a mandate of the supreme court of the State of Oregon theretofore made, filed and entered in said suit, wherein said suit was remanded to said circuit court for final decree; said decree and judgment being against this defendant, and in favor of the said above named plaintiff, by which said decree and judgment, this defendant was ag-rieved, in that in said judgment and decree and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the assignment of errors filed with this petition.

Wherefore, plaintiff prays that a writ of error may issue to the United States Supreme Court, directed to the circuit court of the State of Oregon, for Malheur county, for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to said Supreme
92 Court of the United States.

R. J. SLATER,
Attorney for Defendant.

93 SALEM, ORE., —— —, *A. D.* 1902.

Desiring to give petition-s an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the bond in the final sum of one thousand ($1,000) dollars, herewith presented, be*ing* approved.

In testimony whereof, witness my hand this — day of ——, A. D. 1902.

——— ———,
Chief Justice of the Supreme Court of the State of Oregon.

STATE OF OREGON, *Supreme Court,* } *ss:*

Let the writ of error issue upon the execution of a bond by I. H. Adams, in the sum of one thousand dollars; said bond when approved to act as a supersede-s.

Dated this October 3, A. D. 1902.

FRANK A. MOORE,
Chief Justice.

94 In the Supreme Court of the State of Oregon.

J. M. CHURCH, Administrator of the Estate of R. M. Steel, Deceased, Plaintiff,
vs.
I. H. ADAMS, Defendant. } Specifications of Error.

Comes now the defendant and files the following assignment of error upon which he will rely in his prosecution of the writ of error in the above entitled cause:

1.

That the supreme court of the State of Oregon, erred in modifying the decree entered in said cause in the supreme court of the State of Oregon for Malheur county, in regard to the following described land, to-wit:

The west half (W. ½) of the south-east quarter (SE. ¼) and the east half (E. ½) of the south-west quarter (SW. ¼) of section twenty-four (24), township eighteen (18), south, range 45, E. W. M., known as the I. H. Adams timber culture entry;

2.

In not holding and deciding under the pleadings in this case that the partnership of Steel & Adams, consisting of R. M. Steel and I. H. Adams, never owned said land;

3.

Erred in decreeing that the said land above described,
95 should be, and is, conveyed to the partnership of said Steel & Adams, consisting of R. M. Steel & I. H. Adams;

4.

Erred in sustaining the findings of fact and conclusions of law and decree of the circuit court of the State of Oregon, in regard to said land;

5.

Erred in holding and deciding, "that at the commencement of this suit, the said firm of Steel & Adams, owned the tract known as the "Adams timber culture entry" and decreeing said partnership to be the owner of said lands, more particularly described as the west half (W. ½) of the south-east quarter (SE. ¼) and the east half (E. ½) of the south-west quarter (SW. ¼) of section twenty-four (24), township eighteen (18), south, range forty-five, E. W. M. in Malheur county, Oregon;

6.

Erred in decreeing and commanding the circuit court of the State of Oregon for Malheur county, Oregon, to decree "that the said firm of Steel & Adams, is the owner of said land, and that the defendant has no interest therein, except as a member of said firm;

7.

Erred in not holding that the contract set forth in the complaint and the reply in this case regarding said land is contrary to the statutes of the United States governing timber culture entries, and the rules and regulations of the Secretary of the Interior, in relation to the same and in not holding that said contract is contrary to the public policy of the Government of the United States and laws, rules and regulations thereof, in regard to the entry of public lands.

1609

96 Wherefore, the defendant prays a reversal of said decree and such disposition of the cause as in accordance with the law and statute of the United States in such cases made and provided, all of which is respectfully submitted.

R. J. SLATER,
Attorney for Plaintiff.

97 [Endorsed:] In the supreme court of the State of Oregon. J. M. Church, administrator, of the estate of R. M. Steele, deceased, plaintiff, *vs.* I. H. Adams, defendant. Petition for writ of error. Filed Oct. 6 1902 W. G. Thomson county clerk of Malheur county Oregon R. J. Slater attorney for defendant.

98 In the Supreme Court of the United States.

J. M. CHURCH, Administrator of the Estate of R. M. Steele, Deceased, Plaintiff and Defendant in Error,
vs.
I. H. ADAMS, Defendant and Plaintiff in Error.
} No. —. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the State of Oregon for Malheur county, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the Honorable M. D. Clifford, between J. M. Church, administrator of the estate of R. M. Steele, deceased, plaintiff and defendant in error, and I. H. Adams, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on Tuesday, the 2nd day of December, A. D. nineteen hundred and two, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this October 3, 1902.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States
for the District of Oregon.

Allowed by
FRANK A. MOORE,
Chief Justice of the Supreme Court
of the State of Oregon.

[Endorsed:] In the Supreme Court of the United States. J. M. Church, administrator of the estate of R. M. Steele, deceased plaintiff and defendant in error *vs.* I. H. Adams, defendant and plaintiff in error. Writ of error. Filed Oct. 6 1902 W. G. Thomson clerk of Malheur Co. Oregon By —— —— deputy clerk.

99 In the Supreme Court of the State of Oregon.

J. M. CHURCH, Administrator of the Estate of R. M. Steele, Deceased, Plaintiff,
vs.
I. H. ADAMS, Defendant.
} Bond on Writ of Error.

Know all men by these presents, that, we, I. H. Adams as principal, and J. H. Farley, as surety, are held and firmly bound unto J. M. Church, administrator of the estate of R. M. Steele, deceased, in the sum of one thousand ($1000) dollars, to be paid to the said, J. M. Church, administrator, his successors in office, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 23rd day of Sept. 1902.

Whereas, the above-named defendant, I. H. Adams, has sued out a writ of error to the Supreme Court of the United States to reverse the decree in the above entitled cause by the supreme court of the State of Oregon.

Now, therefore, the condition is such that if the above named I. H. Adams shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

I. H. ADAMS. [SEAL.]
J. H. FARLEY. [SEAL.]

100 STATE OF OREGON, *County of Malheur*, } *ss:*

I, J. H. Farley, being first duly sworn, say, I am the surety above named and that I am a resident householder and freeholder, within

16096

the State of Oregon and am worth the sum of $2000.00 over and above all my just debts and exclusive of property exempt from execution.

In witness whereof, I hereunto set my hand this 23d day of September 1902.

J. H. FARLEY.

Subscribed and sworn to before me this 23d day of September, 1902.

[Seal of Will R. King, Notary Public, State of Oregon.]

WILL R. KING,
Notary Public for Oregon.

101 STATE OF OREGON, } ss:
County of Malheur, }

I, Will R. King, being first duly sworn, upon my oath say: That I have made a diligent search and inquiry, concerning the amount of property, real and personal, and its value, owned by Mr. J. H. Farley, the person whose name is subscribed to the foregoing undertaking and bond, and as a result of such investigations, believe him to be safely worth two thousand ($2,000) dollars, over and above all just debts and liabilities and property exempt from execution.

WILL R. KING.

Subscribed and sworn to before me this 23 day of September, 1902.

[Seal of A. N. Soliss, Notary Public, State of Oregon.]

A. N. SOLISS,
Notary Public for Oregon.

STATE OF OREGON, } ss:
Supreme Court, }

The foregoing bond was submitted to and approved by me this October 3, A. D. 1902.

FRANK A. MOORE,
Chief Justice.

102 [Endorsed:] In the supreme court of the State of Oregon. J. M. Church, administrator of the estate of R. M. Steele, deceased, plaintiff, *v.* I. H. Adams, defendant. Bond on writ of error. Filed Oct. 6, 1902. W. G. Thomson county clerk.

103 *Statement.*

The writ of error and bond on writ of error, were each and both filed in the office of the county clerk of Malheur county, Oregon, on the sixth day of October A. D. 1902.

W. G. THOMSON,
County Clerk,
By B. W. MULKEY, *Deputy.*

104 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I hereby certify that I served the within citation, on the therein named, C. H. Finn, attorney for the defendant in error, in the court below, on the first day of November, 1902, at the city of La Grande, in the district of Oregon, by then and there delivering to the said C. H. Finn, personally, a true copy of the within citation,

Dated at Portland, Oregon, this 7th, day of November, 1902,

W. F. MATTHEWS,
United States Marshal, District of Oregon,
By JACOB PROEBSTEL, *Deputy.*

105 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To J. M. Church, administrator of the estate of R. M. Steel, deceased, and C. H. Finn, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the State of Oregon for Malheur county, wherein I. H. Adams is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Salem, in said district, this October 3, 1902.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

[Endorsed:] No. —. In the supreme court of the State of Oregon. J. M. Church, administrator of the estate of R. M. Steel, deceased, *vs.* I. H. Adams. Citation on writ of error. Filed Nov. 12, 1902 W. G. Thomson clerk. By —— —— deputy clerk.

Service of the within citation is hereby accepted at Enterprise, Wallowa county, State of Oregon, this — of October 1902.

—— ——,
Attorney for J. M. Church, Administrator of the Estate of R. M. Steel, Deceased.

106 *Statement of Costs.*

Costs of pl'ff in circuit court..... .... $369.50

Neither party taxed with costs in supreme court.

W. G. THOMSON, *Clerk,*
By B. W. MULKEY, *Deputy.*

1609

107 STATE OF OREGON, } ss:
County of Malheur, }

I W. G. Thomson, county clerk of Malheur county, State of Oregon, and *ex officio* clerk of the circuit court of the State of Oregon for Malheur county, hereby certify, that in obedience to the within writ of error, I herewith transmit to the Supreme Court, a full true and complete transcript, of the record and proceedings in the case within mentioned, which is hereto attached, together with the original petition and assignments of error, a copy of the undertaking, citation with return of summons, the original writ, a copy of which and a copy of the petition and assignment of error, is retained by me for the use of the defendant in error.

In testimony whereof I hereto set my hand as clerk, and affix the seal of the said circuit court, this 24th day of November A. D. 1902.

[Seal Circuit Court, Malheur County, State of Oregon.]

W. G. THOMSON, *Clerk,*
By B. W. MULKEY, *Deputy.*

Endorsed on cover: File No. 18752. Oregon, Malheur Co. circuit court. Term No. 169. I. H. Adams, plaintiff in error, *vs.* J. M. Church, administrator of R. M. Steel, deceased. Filed December 16, 1902.



In the Supreme Court

OF THE

UNITED STATES

October Term, 1903.

No. 169

I. H. ADAMS,
Plaintiff in Error,

vs.

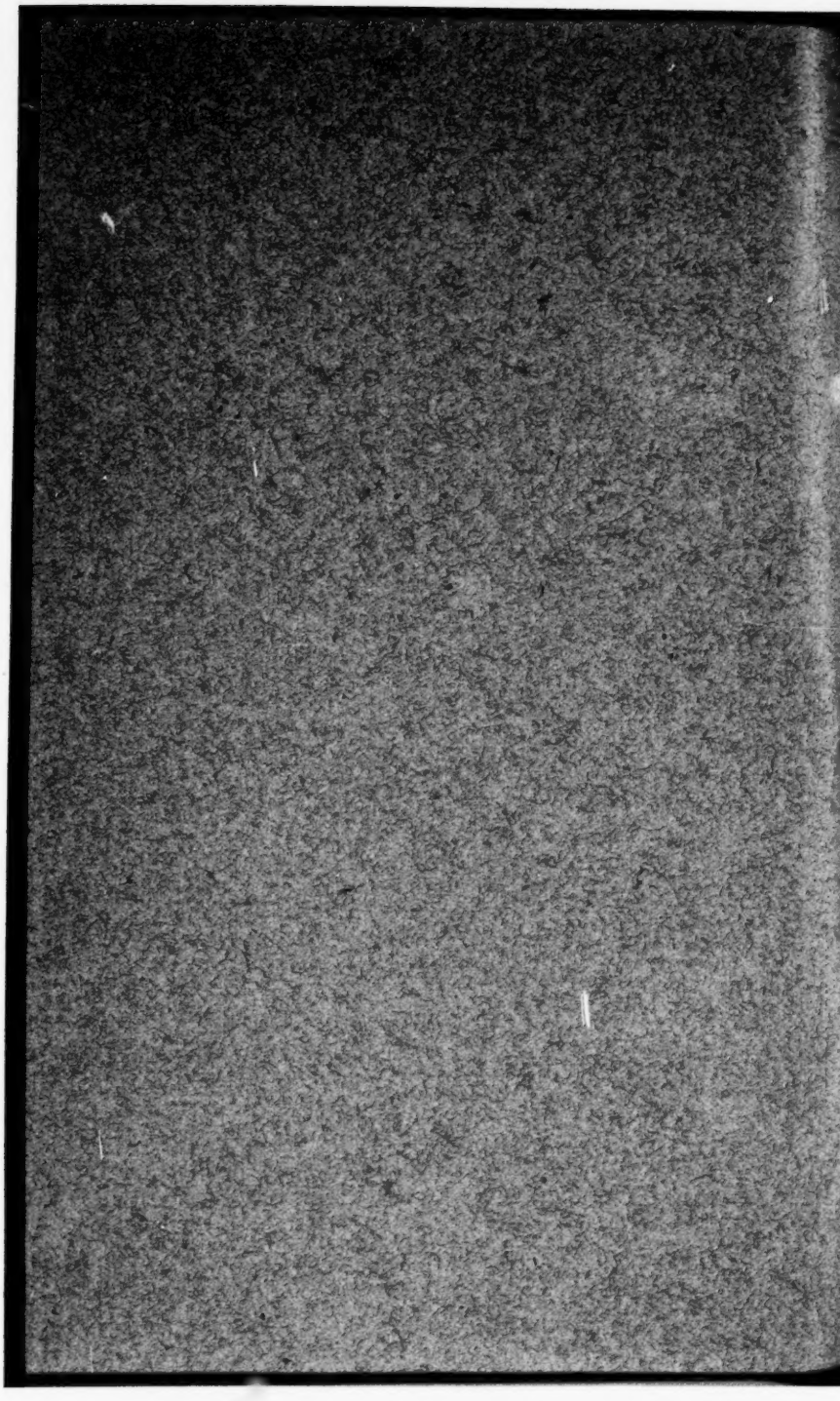
J. M. CHURCH, Administrator of R. M. Steel, deceased,

R. J. SLATER,
WILL R. KING,
Attorneys for Plaintiff in Error.

In Error to the Circuit Court of the State of Oregon for Malheur Co.

Filed _____

(18,152)



16099

In the Supreme Court

OF THE

UNITED STATES

October Term, 1903,

I. H. ADAMS,
Plaintiff in Error.
vs.
J. M. CHURCH, Administrator of R. M. Steel, deceased,
Defendants in Error.
18752

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This case stands on a motion by the defendant in error to dismiss for want of jurisdiction here. This required, under the rules, the defendant in error to serve his brief first, which he has done, and his statement of

the case several very important errors occur, which necessitate a statement from us, and a careful examination of the record by this Court, to determine the truth in regard to these differences.

This is a writ of error to the Cicuit Court of the State of Oregon for Malheur County, to review a decree, rendered therein according to a mandate of the Supreme Court of the State of Oregon, wherein it is decreed that the West half of the Southeast quarter, and the East half of the Southwest quarter, Section 24, Township 18 South, Range 45, E. W. M., situated in Malheur County, Oregon, be the property of a partnership firm of Steel & Adams, and not the property of the plaintiff in error.

The suit was commenced by R. M. Steel in his lifetime against I. H. Adams for a dissolution, and settlement of the partnership relations theretofore existing between them, and involved a large amount of assets and liabilities.

The only question involved in the suit, which can be considered here is so much of the decree as refers to the land above described, therefore, we will refer only to those particular parts of the pleadings which pertain to the land.

"Paragraph 6 of the complaint is in the following words, "That the money so invested in said partnership by plaintiff, and the said money advanced said firm, and business, there has been purchased by and for said partnership and really belongs to said firm:

The east half of the northwest quarter and the north-half of the northeast quarter, of section 20, township 15 south, range 40, E. W. M., and the west half of the north east quarter, and the northeast quarter————————,

and the northwest quarter of the southwest quater, section 26, in township 15, south of range 39 E. W. M., W. ½ *S. E.* ¼, *E.* ½ *S. W.* ¼ E. ½ S. E. ¼, E. ½ N. E. ¼, and the west half of the northwest quarter, and the west half of the southwest quarter, *of section* 24, *township* 18, *south of range* 45 *E. W. M.*, all in Malheur County, State of Oregon, together with the many and valuable and permanent improvements thereon, of the approximate value of about $5,000, etc," (See page 2, printed record).

"Paragraph 9. that of said real estate the said west half of the southeast quarter, and the east half of the southwest quarter, of section 24, township 18, south of range 45, E. W. M. the said defendant has procured the title to be taken in his own name, and placed thereon valuable improvements consisting of fences, orchards, wells and wind-pump, at great cost and expense, when in truth and in fact the same were bought with partnership funds and the pltintiff alleges the same to belong to said firm and the said defendant should be required to account for such property and convey the same to the said partnership," (See page 3 of the printed record).

The prayer of the complaint is as follows, "WHEREFORE, the plaintiff pravs that defendant be enjoined from further managing or controlling, or disposing of, or encumbering any of said partnership property or business, and that a receiver be immediately appointed by the court, to take charge of the assets of every description, belonging to the partnership, and manage the same under the direction, orders and decrees of this court, that to preserve and sell the same for the benefit of said partnership and pay off the firm indebtedness out of said assets."

"2 That said firm of Steel and Adams be dissolved etc."

"3 That defendant be required to account to plaintiff and under the directions of the court for all the transactions of the said firm, and for plaintiff's advancements and just dues therein, and property and moneys by him handled and expended, both for the firm and for himself."

"4 That after the firm debts and liabilities are paid that if there be anything left that this plaintiff may have returned to him his capital therein invested, and his claims fully paid and his share of the profits of said business."

"5 That defendant be required to convey the partnership what property belongs to said firm."

"And for general relief, etc." (See pages 3 and 4 of the printed record).

The above allegations of the complaint were specifically denied by the answer (See pages 7 and 8 and 9 of the printed record).

And in the further and separate answer the defendant, (plaintiff here) alleged that long prior to the time, when the plaintiff and the defendant entered into the articles of agreement and co-partnership, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof, the defendant had filed under the timber culture act of the United States on the west half of the southeast quarter, and the east half of the southwest quarter of section 24, township 18, south range 45 E. W. M., and that prior to the making of said contract between the plaintiff and the defendant, this defendant had cleared off and prepared for artificial irrigation about 60 acres of

said piece or parcel of land, and every year since the said time, the said land has been cultivated, and crops produced thereon consisting of potatoes, grain, alfalfa, used and appropriated by the said firm.

That the crops of hay and grain raised upon said land of this defendant, and used for the benefit of said co-partnership, far exceed in value any improvements that have been placed thereon by this defendant out of the fund belonging to this co-partnership.

That for several years past fully 110 acres of said land, the property of this defendant, has been in a high state of cultivation and producing very large crops of hay and grain and the whole of said crop have been appropriated by said firm, and the reasonable rental value of said land, during the continuance of the said partnership has been $2,000, and the defendant has never received any compensation from said firm therefor.

That the title to said land is still in the United States; that defendant is the equitable owner thereof, and the same is the separate and individual property of this defendant." (See pages 13 and 14 of the printed record).

The articles of co-partnership referred to and attached to the answer as Exhibit "A" do not refer in any manner to the land in controversy. (See page 15 of the printed record).

The plaintiff (defendant here) in his reply specifically denied these allegations, and further alleged:

"And that plaintiff alleges that the said filing and said land has been maintained and improved by the partnership and for partnership purposes, and as alleged in the complaint, and that plaintiff denies, etc., etc.

That final proof hereof was duly made on or about June, 1896, duly accepted by the General Land Office, and that said land is subject to sale, conveyance or partition by or between plaintiff and defendant, and that all that remains on the part of the United States is the issuance of patent therefor, and denies that the said land is the separate or individual property of this defendant, but alleges that the same belongs to said partnership, etc. And alleges further that plaintiff (defendant in error) advanced money of his own and permitted the use of partnership funds in the improvement of said alleged timber culture claim with the understanding and agreement on the part of the defendant plaintiff in error that the same should constitute partnership land, and should inure to the benefit of said co-partnership, and that defendant is now estopped from alleging or claiming the said land as and is his individual property." (See pages 20 and 21 of the printed record).

Under Sec. 94, Hills Code of Oregon, all the new matter alleged in the reply is to be deemed controverted by the defendant as upon a direct denial or avoidance, as the case may require. (See also Bellinger & Cotton's Ann. Codes & Stats. of Oregon, Sec. 95).

Upon the issues thus formed the suit was tried and the court in its findings of fact found as contended for the plaintiff in error (See finding No. 7, page 24 of the printed record) and entered its decree accordingly (see page 28 printed record).

From that decree the plaintiff (defendant in error) appealed to the Supreme Court of the State of Oregon, but not as to the whole of the decree but only from that

portion thereof wherein it was recited that I. H. Adams is the legal and equitable owner of the west half of the southwest quarter, and the east half of the southwest quarter of section 24, in township 18, south of range 15, East Willamette Meridian, and that the said firm has not now and never has had any interest therein," and one other portion not material at this time. (See page 29 of the printed record).

Upon the appeal being perfected the appellant (defendant in error) caused to be filed with the clerk of the Supreme Court a transcript of the cause which consisted of a copy, certified by the clerk (of the lower court) of the roll or final record, or the pleadings, orders, papers and journal entries that constitute such roll or record, together with a copy of the notice of appeal, etc. See sub. div. 1, sec. 541, Hills Ann. Laws of Oregon.)

To this transcript was attached all the original papers containing the evidence. (See sub. div. 2, sec. 541, Hills Ann. Laws of Oregon.)

This being a suit in equity the Supreme Court tried the same *de-novo* upon the transcript, and the evidence (Hills Ann. Laws of Oregon, Sec. 543) and modified the decree by declaring among other things:

That at the commencement of this suit the said firm of Steel and Adams, owned the tract known as the Adams timber culture entry, more particularly described as the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18, S. R. 45, E. of the W. M. in Malheur county, Oregon, and the cause was remanded to the court below, the Circuit Court of the State of Oregon for Malheur County, with instructions that a decree be entered there

in accordance with the decision of the Supreme Court (See pages 31, 32 and 33 of the printed record.)

Such decree was accordingly entered on the 8th day of October, 1900. (See pages 34, 35 and 36 of the printed record.)

From the appeal thus entered we appeal to this court by writ of error to the Circuit Court of the State of Oregon for Malheur County.

POINTS.

Upon the motion to dismiss we claim

1.

That the writ is directed to the court of final jurisdiction and to the highest court having possession of the complete record, including the final decree.

2.

That the plaintiff in error claimed the land in controversy under the timber culture law of the United States, and that the alleged contract between plaintiff and defendant whereby the plaintiff agreed to enter said land under the timber culture law, for the use of the co-partnership existing between plaintiff and defendant, was and is null and void because it is contrary to the public policy of the United States and the denial of this claim by the Supreme Court of the State of Oregon raises a Federal question.

FIRST.

When the appeal in this suit was perfected all the original record, except the evidence, remained in the court below. A copy of this record was made and certified to by the clerk of the lower court. To this copy

of the record the evidence was attached and thereby the transcript was completed and it was filed in the Supreme Court thereby completing the appeal, from which time the Supreme Court had jurisdiction, and thereafter rendered its decision. (See pages 36 to 41 printed record.)

Then under the well known practice of the Supreme Court in suits in equity the cause was remitted by mandate to the lower court with instructions to that court to enter the final decree in accordance with its decision. The Supreme Court renders the final decision, but the final record of that decision is made in the lower court.

Sec. 546, Hill's Ann. Laws of Oregon, is as follows, "The decision of the appellate court shall be given and enforced as provided in this secton:

1. Under an appeal to the Supreme Court, its decisions shall be entered in the Journal, and the cause remitted by mandate to the court below for further proceedings as therein directed. If a new trial be ordered, upon the receipt of the mandate by the clerk of the court below and decision and orders shall be entered in the Journal and thereafter the cause shall be deemed pending and for trial in such court, according to the directions of the appellate court.

2. If a new trial is not ordered upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the Journal and docketed in pursuance of the directions of the apellate court, in like manner and with like effect as if the same was given in the court below."

Therefore, the writ of error in this case was properly directed to the circuit court.

Gilston vs. Hoyt, 3 Wheat. 246.

Lee vs. Johnson, 116 U. S. 49.
Hawkes vs. People, 170 U. S. 189.
Brown vs. N. J., 172 U. S 528.
Cumming vs. Board, 175 U. S. 172.
Roller vs. Holly, 176 U. S. 398.
Guasanty vs. Bladow, 176 U. S. 448.
Thorman vs. Fram, 176 U. S. 350.
Murphy vs. Commonwealth, 177 U. S. 155.

The decree we seek to review is the decree of the Supreme Court as well as the decree of the court below, but the court below is in possession of the original and final record and the writ must be directed to the court which holds the proceedings as part of its records and exercises judicial power over them.

Atherton vs. Fowler, 91 U. S. 143.

There is nothing in the record to show that the court below, to which the writ of error is directed, is not in possession of the original evidence. We are not seeking to review the facts, so it is not necessary to have the evidence here. The findings of fact and conclusions of law of the Supreme Court of the State of Oregon in this suit are here and we understand the rule to be that we are bound by the findings of fact.

Eagan vs. Hart., 165 U. S. 188.
Sanford vs. Sanford, 139 U. S. 642.
Anderson vs. Carkins, 135 U. S. 483.

This court can read the decision of the Supreme Court and if it can be determined from that document that a Federal question was raised and that it was decided adversely to the plaintiff in error this court will retain the case.

SECOND.

A careful reading of those portions of the pleadings contained in our statement of the case, together with the decision of the Supreme Court of the State of Oregon, cannot fail to show to this Court that the plaintiff in error claimed the land under the timber culture law of the United States, and that the patent had not been issued at the time the suit was commenced, and at the time the partnership was formed, final proof had not been made and plaintiff in error never did surrender the possession of the land, and that the alleged contract to enter and prove up on it for the use and benefit of the partnership was void as contrary to the public policy of the United States government, and the allegations of the defendant in error as to that contract being in his reply, is under the statutes of Oregon (Hills Ann. Laws of Oregon, Sec. 94) deemed to have been denied and controverted in avoidance. The very peculiar manner of pleading of the defendant in error in the complaint and in the reply, precluded the plaintiff in error from any more definitely pleading and alleging specifically that the said alleged contract was void as against the public policy of the United States, but that the issue thus formed did present such an issue is certainly authenticated by the decision of the Supreme Court which denies plaintiff his rights under the timber culture law. That such a question is a Federal question see Anderson vs. Carkins, 135 U. S. 483.

Kukanne W. P. Co. vs. The Green Bay & Miss. C. Co., 142 U. S. 274.

Wilson vs. Black Bird Mash Co., 27 U. S. 245.

Bridge Proprietors vs. Hobken L. I. Co., 68 U. S. 116.

Chicago L. Ins. Co., vs. Needles, 116 U. S. 574.

Murray vs. Charleston, 96 U. S. 432.

Furman vs. Nichols, 75 U. S. 44.

Eureka vs. Unba, 116 U. S. 410.

Armstrong vs. Attura Co., 41 U. S. 281.

Harris vs. Dennis, 3 Peters 41.

Davis vs. Picard, 6 Peters 41.

Crowell vs. Randall, 10 Peters 368.

Gross vs. Mtg. Co., 108 U. S. 477.

Fire Ass. vs. N. Y., 119 U. S. 110.

Upon the authorities we contend that it is sufficient to give this court jurisdiction if it appears from the record without an averment in so many words, that the decision in the state court was against the privilege or right set up under an act of Congress, and so far as the motion to dismiss is concerned we submit the case to this Honorable Court.

The decree could not have been rendered against the defendant (plaintiff in error) without denying him the protection asserted by him under the timber culture laws, hence the case is one in which a right was specifically set up and claimed under the statute of the United States and the decision of the state court being against that right this court has jurisdiction.

BRIEF ON THE MERITS.

The Supreme Court of the State of Oregon found the following facts and conclusions of law:

"And the court further finds that the said Adams timber culture tract, was included in the said sale by the respondent to the said firm."

"And as conclusions of law from the foregoing facts, the Court further finds:

That at the commencement of this suit the said firm of Steel & Adams, owned the tract known as the Adams timber culture entry, more particularly described as the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18 S. of range 45 E, of the W. M., in Malheur county, Oregon."

Upon those findings it entered a decree as follows:

"It is, therefore, further ordered and decreed—the said firm of Steel & Adams is the owner of the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼ of Sec. 24, Tp. 18, S. range 45 E. of E. M., in Malheur county, Oregon, and that the respondent has no interest therein except as a member of said firm."

Under the mandate of the Supreme Court of the State of Oregon the above findings and conclusions of law and decree were entered in the journal of the Circuit Court as its decree, and plaintiff in error relies upon the following specifications of error.

I.

That the Supreme Court of Oregon erred in modifying the decree entered in said cause in the Circuit Court of the State of Oregon, for Malheur county, in regard to the land covered by said timber culture entry.

II.

In not holding and deciding under the pleadings in this case that the partnership of Steel & Adams, consisting of R. M. Steel and I. H. Adams, never owned said land.

III.

Erred in not sustaining the findings of fact and conclusions of law and decree of the Circuit of the State of Oregon, in regard to said land.

IV.

Erred in holding and deciding "That at the commencement of this suit, the said firm of Steel & Adams owned the tract known as the Adams timber culture entry," and decreeing said partnership to be the owner of said land, more particularly described as the west-half (W. $\frac{1}{2}$) of the south-east quarter (S. E. $\frac{1}{4}$) and the east-half (E. $\frac{1}{2}$) of the south-west quarter (S. W. $\frac{1}{4}$) of Section twenty-four (24), township eighteen (18) south range forty-five, E. W. M., in Malheur County, Oregon.

V.

Erred in decreeing and commanding the Circuit Court of the State of Oregon for Malheur County, to decree that the said firm of Steel & Adams is the owner of said land, and that the defendant has no interest therein, except as a member of said firm.

VI.

Erred in not holding that the contract set forth in the complaint and reply regarding said land is contrary to the statute of the United States governing timber culture entries, and the rules and regulations of the Secre-

tary of the Interior in relation to the same, and in not holding that said contract is contrary to the public policy of the Government of the United States, and laws, rules and regulations thereof in regard to the entry of public lands.

It is not necessary to take up these different assignments of error in detail since they each really embody the same essential error.

From the pleadings and findings of the lower court in this case the following facts must be considered as the facts of the case.

1st. That on the 17th day of November, A. D. 1885, R. M. Steel and I. H. Adams, in writing, entered into a partnership agreement.

2nd. At that time the plaintiff in error was in possession of the land involved and had entered it under the timber culture law of the United States, but had not made final proof thereon.

3rd. That at the time of the commencement of this suit the plaintiff in error had proved up on his said timber culture entry and held the ———————— —receiver's duplicate receipt for the same, which entitled him to a patent therefor.

4th. That plaintiff in error had not at the time of the commencement of this suit in any manner transferred any part of said land or any interest therein to R. M. Steel or to the firm of Steel & Adams.

5th. "That plaintiff (R. M. Steel) advanced money of his own and permitted the use of partnership funds in the improvement of said alleged timber culture claim, with the understanding and agreement on the part of the

defendant, I. H. Adams, that the same should constitute partnership lands and should inure to the benefit of said co-partnership."

The Court will observe that the last fact named is contained in the reply for which reason it is deemed fully denied and controverted, under the statutes of Oregon.

By referring to the decision of the lower court, which is a part of the record here, the Court will see that the defendant (plaintiff in error) did most strenuously deny it, and also claims that if it were true it was void as against public policy and as contrary to the timber culture laws of the United States, thereby raising and presenting to the Court a Federal question, which was decided against the plaintiff in error.

To settle this point it will be necessary to examine and construe the timber culture law and the rules and regulations of the General Land Office in relation thereto, and the general policy of the Government in the disposal of the public lands.

The act of Congress, approved June 14, 1878, (20 Stats. 113) is the law referred to as the timber culture law.

Sec. 2 provides that when a person applies to enter land thereunder he must make affidavit before either of certain officers, and in that affidavit he must state under oath:

"That I have made the said publication in good faith and not for the purpose of speculation, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate

the land and to fully comply with the act or acts of which this is amendatory, etc."

Sec. 4 provides that land so entered shall not in any event become liable for any debt or debts contracted before the issuing of the final certificate.

Sec. 5 provides that the commissioner of the General Land office is required to prepare and issue such rules and regulations consistent with the act as shall be necessary and proper to carry the law into effect.

Sec. 6 provides that all the 5th section of the act entitled "An act in addition to an act to punish crimes against the United States, and for other purposes, approved March 3rd, 1857, shall extend to all oaths, affirmations and affidavits required or authorized by this act."

The necessary rules and regulations under the law which govern this case are contained in the general circular of January 1st, 1889, Copp's Land Laws 1890, Vol. 2, p. 85, in which section 5 provides for the affidavit required by the act itself, and section 24 provides where, when and before whom the final proofs and affidavits may be made. Section 26 provides what character of proof shall be made and the form thereof, viz, forms 4-093 and 4-385 and 4-386.

Form 4-385 provides that the claimant shall make an affidavit before the officer taking the final proof to the following effect:

"FINAL AFFIDAVIT.

I, _____ having on the _____ day of _____ 18—, made a timber culture entry at _____

under the timber culture laws of the United States do hereby apply to prove my claim thereto by virtue of the 7th section of the act of June 14th, 1878, entitled, 'An act amending an act entitled an act to encourage the growth of timber on the western prairies,' and for that purpose do solemnly ———————— that my aforesaid entry was made in good faith and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person whomsoever, etc." See General Land Circular for 1899, page 286.

We contend that the timber culture act and the above rules and regulations promulgated by the Commissioner of the General Land Office for the purpose of carrying that law into effect must be read and construed together and that the affidavit required by the regulation is just as binding as the affidavit required by the act itself. Such rules and regulations have the force of law.

U. S. vs. Eaton, 144 U. S. 688.

Now the affidavit required of the claimant at the time he applies for the entry is identically the same as that required at the time he makes his final proof, and by reason of that affidavit any contract made by the claimant prior to his entry is without doubt void as contrary to the statute and public policy of the United States Government, and such a contract cannot possibly be carried out without perjury.

Fleischer vs. Fleischer, 91 N. W. Rep. 51.

but the contract in the case at bar was made after the first affidavit was made, for which reason the Supreme Court of the State of Oregon held that it was not inhibited by the act itself, and, therefore, it was not contrary

to the public policy of the United States and could be enforced after final entry by the applicant. That conclusion is certainly wrong because it is not necessary that an act should expressly forbid the making of the contract.

Harris vs. Runels, 12 Howard 99.

U. S. Bank vs. Owens, 2nd Peters 527.

The Pioneer, Deady 72.

Public policy is determined from the constitution, laws and decisions of the Courts of the United States.

15 Amer. & Eng. Ency. of law 933.

Now by reading the timber culture law (20 Stats, pp. 113 to 115) and comparing that statute with the homestead and pre-emption laws it seems very plain that the general policy of the United States in disposing of the public land is to secure to each entryman his entry and to prevent any one individual from securing either directly or indirectly more than one entry under each of the said laws, and any contract which is designed to subvert that general public policy of the Government cannot be enforced in a court of equity.

Anderson vs. Carkings, 135 U. S. 483.

Now we desire to further apply the principle of the case last cited and for that purpose call the special attention of the Court to Sec. 6 of the timber culture act, which adopts into that statute the 5th section of the act of March 3rd, 1859, and that section provides that any person making a false affidavit which is authorized or required under the rules and regulations of the department commits perjury. Then, *a priori*, if the contract in this case was made as found by the court below, it made

in contemplation of the commission of perjury, and, therefore, under the authority of Anderson vs. Carkings supra it is void and cannot be enforced in a court of equity. Either this conclusion is true or else there is no validity in the final affidavit required at the time of making the final proof.

We have cited the case of Fleischer vs. Fleischer, 91 N. W. Rep. 51, and desire to call the attention of the Court to the fact that the Honorable Judge who rendered that decision referred to the decision of the Supreme Court of Oregon to the case at bar (61 Pac. Rep. 659) and in his statement of the Oregon case he used the language:

"In the Oregon case a party who had made a good entry of a tract of land under the timber culture law entered into a written contract to transfer his claim."

The Oregon decision does not say nor does the Court find that the contract was in writing, but from the oral testimony of the witnesses, corroborated by certain memoranda made by George Steel at the time the partnership agreement was entered into the court found that Adams had agreed to sell his timber culture and prove up on it and then transfer it to the partnership. The fact that there ever was such a contract was strenuously denied by Adams and that Steel knew and understood and believed that such a contract would be contrary to law is shown by the character of his testimony, which is cited in the opinion which is a part of the record in this case. If it were possible for this court to review the facts we have no hesitancy in saying that the evidence recited in the decision upon which the findings of fact are based is not sufficient as a matter of law to sustain the findings and decree.

The lower court in its decree cites two cases from the land decisions, :

Sims vs. Bruce, 4 L. D. 369.

U. S. vs. Picard, 5 L. D. 313.

and upon these decisions bases the statement that the timber culture law does not inhibit the claimant who has made his entry in good faith from contracting to sell his claim prior to the final proof, and the law seems to be so interpreted by the Land Department. The cases cited are not similar to the case at bar and do not tend in any manner to uphold the principle established by the Oregon court, viz. That the law does not inhibit the claimant from selling his claim after he has entered it and before final proof. He has the right to sell his claim and relinquish his right to the government if he so desires, and if he offers to do so it is not sufficient ground to constitute a good cause of contest. That is what the Department decided in these two cases. It is not held there or in any other case in the Department that an entryman can sell or contract to sell his right, and agree to prove up and obtain a patent and then deed it to his vendor without violating the provisions of the timber culture law. These cases are not in point. The Court needs only to look at the pleadings to determine the point at issue here. We desire to call your attention to the peculiar allegations of the complaint and reply in regard to the timber culture laws. In the complaint the allegations are to the effect that the land was purchased by Adams and paid for with funds belonging to the partnership before he took the title in his own name. See paragraphs 6 and 9 of the complaint, (pages 2 and 3 of record.) In the reply an entirely different state of facts is set up, viz, that Adams-

filed upon the land under the timber culture law, and agreed with Steel that the entry should be maintained and the land improved as partnership land and should be maintained for the benefit of the partnership at the expense of and out of the partnership funds. The allegations of the reply sets up a contract void as against the public policy of the United States and contrary to the timber culture law, and the lower court erred in not dismissing the case sue sponte.

Oscangan vs. Winchester Arms Co., 103 U. S. 261.

Again, the cause of suit as to the timber culture land which is alleged and relied upon in the complaint is entirely different from that set up in the reply, and the facts found by the Court do not sustain the allegation of the complaint. The fact that there was a contract between Adams and Steel whereby Adams agreed to prove up on his timber culture claim and then transfer it to the partnership does not tend to prove or establish the allegation that Adams had purchased the timber culture, or the land which is covered by the timber culture entry with funds belonging to the partnership. Therefore, the two causes of suit, the one in the complaint, the other in reply, are based upon entirely different facts and the plaintiff should not have been allowed to have abandoned his complaint and recovered on his reply. An entry under the Land Laws of the United States is not a purchase. The reply was clearly a departure from the complaint.

6 Am. & Eng. P. & P. 460.

With these brief suggestions and citations we most respectfully submit the case to this honorable court.

R. J. SLATER,
Attorney for Plaintiff in Error.

OCTOBER TERM, 1878.

No. 1[illegible]

I. H. ADAMS, PLAINTIFF IN ERROR,

vs.

J. M. CHURCH, ADMINISTRATOR OF R. M. STEEL, DECEASED, DEFENDANT IN ERROR.

JOSEPH SIMON,

Attorney for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE STATE OF OREGON FOR MARION COUNTY.

FILED [illegible]

(18,752)

16111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No 169.

I. H. ADAMS,
Plaintiff in Error,
vs.
J. M. CHURCH, Administrator of R. M. Steel, Deceased,
Defendant in Error.
18,752

Brief of Defendant in Error.

STATEMENT OF THE CASE.

This is a writ of error to the Circuit Court of the State of Oregon for Malheur County, *to review a decree rendered by the Supreme Court of Oregon*, and entered pursuant to its direction, upon the journal of said Circuit Court of Malheur county, decreeing the partnership firm of Steel & Adams to be the equitable owner of the W. ½ of S. E. ¼ and E. ½ of S. W. ¼ Sec. 24 T. 18 S., R. 45 E., W. M., situated in Malheur County, Oregon.

The suit was commenced by R. M. Steel in his lifetime against I. H. Adams for a dissolution and settlement of the partnership relations theretofore existing between them, and involved a large amount of assets and liabilities. The complaint also prayed for an injunction and the appointment of a

receiver. Upon the death of Steel his administrator, J. M. Church, was substituted as plaintiff in the suit.

The Circuit Court of Malheur County issued an injunction order and appointed a receiver to take charge of the partnership assets, and proceeded to hear and determine the issues embraced in the suit, dissolved the partnership, provided for the payment of its debts and divided the remaining assets between the parties according to their respective rights therein. The Plaintiff Steel contended that among the assets of the partnership was the tract of land above described and involved in the controversy in this Court. This tract of land had been acquired by the Defendant Adams under the Timber Culture Act and as insisted by Steel sold and contracted to be conveyed by Adams to said partnership. The Defendant Adams disputed this contention on the part of Steel and claimed that the land was his individual property and that he had neither sold the land to nor contracted to sell it to the partnership.

The Circuit Court of Malheur County, upon the evidence submitted, determined the land to be the individual property of the Defendant Adams and found that Adams had neither sold nor contracted to sell the same to the partnership, and also found that he had received no consideration for any such sale.

The Plaintiff Steel being dissatisfied with the decree of the Circuit Court generally, removed said cause by appeal to the Supreme Court of the State.

Upon such appeal a final decree was rendered substantially affirming the partnership settlement as decreed by the Circuit Court, but the decree of the lower Court concerning the Timber Culture land was reversed, the Supreme Court decreeing the land to be partnership property and finding that the same had been sold by Defendant Adams to the partnership and that he, Adams, had received full consideration upon such sale.

The entire evidence, as well as the record of the case, being in the Supreme Court and remaining there permanently, in accordance with the statute regulating appeals in equity cases, a final decree was rendered by the Supreme Court determining all the issues involved in the case. This decree so rendered by the Supreme Court and embraced in a mandate was then forwarded to the clerk of the Circuit Court of Malheur County and thereafter entered on the journal of the Circuit Court by order of that Court but in pursuance of the direction of the Supreme Court and in accordance with its decree—the decree so entered on the journal of the Circuit Court being the identical decree, word for word, as rendered by the Supreme Court.

All the matters and issues involved in the litigation between the parties to this suit have been settled and acquiesced in, other than the rights of the parties to the W. ½ of S. E. ¼ and E. ½ of S. W. ¼ Sec. 24 T. 18 S., R. 45 E.

The only contention made by the Defendant Adams in his pleadings and upon the hearing in the Circuit Court as to this tract of land was that he at no time undertook to sell or convey the same to the partnership and that he had received no consideration for the sale thereof. The point is now made that under the Timber Culture Act, Adams before making his final proof could not sell or contract to convey this land to the partnership, and any contract made by him to that effect is invalid and will not be enforced by the Courts, and now relying upon this contention he seeks a reversal of the decree rendered in the State Court.

At the outset we respectfully submit to the Court that there are two insuperable reasons why this Court cannot consider the merits of this case and must dismiss the writ of error.

First: The writ of error is directed to the wrong court. It is not directed to the court rendering the decree sought to be reviewed, nor to the highest court of the state having jurisdiction to render the decree complained of.

Second: There was no Federal question raised or relied upon in the Court below and no right, title, privilege or immunity specially set up or claimed by the Defendant Adams.

FIRST.

The jurisdiction of the Supreme Court to issue writs of error to the State Courts is derived under Sec. 709 of the Revised Statutes. It can only issue to the highest court of law or equity of the state having jurisdiction to render the decision complained of. While this need not necessarily be the highest court of law or equity in the state, yet the writ can only issue to the court which rendered the final judgment or decree and from which there can be no further appeal or review in the courts of the state; that is, the judgment to be examined must be that of the highest court of the state having cognizance of the case and having possession of the record and having authority to execute its judgment. The effect of the writ of error is simply to bring the record into the appellate court and submit the judgment of the inferior tribunal to re-examination. The writ operates upon the court having the record and not upon the parties.

Cohens vs. Virginia, 6 Wheat. 264, 410.

Suydam vs. Williamson, 20 How. 437.

The writ or error should have been directed to the Supreme Court of Oregon and not to the Circuit Court of Malheur County. The Supreme Court of Oregon is the highest court in that state and appeals from the several Circuit Courts of the state are taken to the Supreme Court. In Oregon the distinction is maintained between a judgment recovered in an action at law and a decree rendered in a suit in equity. Upon an appeal from a decree the suit is tried anew upon the transcript and evidence acompanying it. The whole case is removed to the Supreme Court, and the original testimony, depositions

and other papers containing the evidence heard or offered on the trial in the Circuit Court are filed in the Supreme Court and remain as a permanent record in that court. The Supreme Court renders a final decree in an equity case, settling the rights of the parties and terminating the litigation, and remitting the cause by mandate to the Circuit Court, upon the receipt of which mandate by the clerk, a decree is entered in the journal and docketed in pursuance of the direction of the appellate court in like manner and with like effect as if the same was given in the court below.

Secs. 543, 546 and 541, Sub. 2, Hill's Oregon Code.

The decree entered in the Circuit Court in obedience to the mandate of the Supreme Court is not the decree of the Circuit Court but is the decree of the appellate court.

Apex Trans. Co. vs. Garbade, 32 Ore. 593.

The writ of error must be directed to the court which holds the proceedings as part of its records and exercises judicial power over them.

Hunt vs. Palao, 4 How. 589.

Atherton vs. Fowler, 91 U. S. 143.

In the case at bar the testimony, depositions, original papers and record, remain with the appellate court, the decree rendered is that of the appellate court, and the only province of the Circuit Court is the execution of the decree rendered by the Supreme Court.

The Circuit Court to which the writ of error was directed has neither possession nor control over the testimony, depositions, original papers or record. These have all been removed to and constitute a permanent record in the Supreme Court, and no writ of error to the Circuit Court will bring to this court such testimony, depositions, papers, etc., and with-

out which this court cannot proceed to hear and determine this controversy.

An inspection of the Transcript of Record discloses that the testimony, depositions and evidence upon which this suit was heard and determined in the State Court, and without which the merits of this controversy cannot be passed on by this Court, has not been transmitted to or filed in this Court, and the reason why the same was not transmitted to this Court is that such testimony, depositions and evidence no longer remains with said Circuit Court but upon appeal to the Supreme Court of the state was transmitted to and became part of the permanent record of this case in such court.

The litigation between the parties, on the merits was completely terminated by the decree of the Supreme Court and there remained nothing for the Circuit Court of Malheur County to do, but to execute the decree of the Supreme Court. As the Circuit Court renders no final decree in the case, only enters upon its journal the decree so rendered by the Supreme Court and enforces the same in pursuance of the direction of that court, the writ of error was improperly directed to the Circuit Court of Malheur County and should be dismissed.

Atherton vs. Fowler, 91 U. S. 143.

Polleys vs. Black R. I. Co., 113 U. S. 81.

Underwood vs. McVeigh, 131 U. S. Appendix CXIX.

Mower vs. Fletcher, 114 U. S. 127.

A judgment of an inferior state court, entered after reversal by the highest court of the state of a previous judgment and the remand of the case for further proceedings, cannot be directly reviewed by the United States Supreme Court, although it involves a Federal question, and even though the State Supreme Court, if a second appeal were taken, would necessarily affirm the judgment on the ground that the question

involved was decided on the former appeal. Before the party complaining can have the judgment so reviewed he must appeal to the highest court of the state.

Great Western Tel. Co. vs. Burnham, 162 U. S. 339.

There are some cases in which writs of error may be directed to a subordinate court. Where the record is removed from the Supreme Court of the state and remitted to an inferior court which there renders a final decree then the United States Supreme Court will direct its writ of error to the subordinate court. That is, if the Supreme Court of the state without *retaining a copy remits the entire record* to the inferior court with instructions to enter a final judgment in the case, the writ of error may be directed to the inferior court, but where the record remains in the Supreme Court, as it does in Oregon, then the writ of error can only be directed to the Supreme Court of the state.

Polleys vs. Black R. I. Co., 113 U. S. 81.

Lee vs. Johnson, 116 U. S. 48-9.

Judge Clifford's dissenting opinion in Underwood vs. McVeigh, 131 U. S. Appendix CXIX.

A case analogous in principle and practically deciding the point relied upon by us is Atherton vs. Fowler, 91 U. S. 143. In that case a judgment was rendered by one of the District Courts of the State of California and upon appeal to the Supreme Court of the state the judgment was reversed and remanded with direction to the lower court to try the case anew unless the defendants should consent to the modification thereof suggested by the appellate court. The defendants filed their written consent to such modification and the judgment of the District Court was accordingly modified. Upon a motion to dismiss the writ of error which had been sued out in this court and directed to the Supreme Court of California, it was held by this court that the judgment of the Supreme Court of Cal-

ifornia was the final judgment in the suit within the meaning of the act of Congress, and that the writ of error was properly directed to the Supreme Court. The reversal and modification of the judgment of the court below did not permit further proceedings in the District Court if the defendants consented to the modification directed as to the amount of damages. Such consent having been given, the judgment of the court below was the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court and no discretion left to the lower court, if the required consent was given. There is no difference in principle between that case and the case at bar and seems to us to be decisive of the point raised by us that the writ of error in this cause was improperly directed to the Circuit Court of Malheur County.

That the decree rendered by the Supreme Court in an equity suit and remitted by mandate to the Circuit Court for entry upon its journal is the final decree of the Supreme Court and not the decree of the Circuit Court will be apparent from an examination of the statutes of Oregon upon the subject of appeals. Only in exceptional and extremely rare cases will a suit in equity be remanded to the Circuit Court for further consideration. As was said in the case of Robson vs. Hamilton, 41 Oregon 246: "Suits in equity are tried anew on appeal and a final decree is usually rendered in this court and a cause should not be remanded to the lower court for further consideration unless necessity demands it."

But the precise question involved here was determined by the Supreme Court of Oregon in Apex Trans. Co. vs. Garbade, 32 Ore., 593, wherein, it is held that the judgment entered in the Circuit Court in obedience to the mandate of the Supreme Court is not the judgment of the Circuit Court but is practically the judgment of the appellate court.

We further submit that counsel for the plaintiff in error apparently believe that it is the decree of the Supreme Court

of Oregon and not of the Circuit Court of Malheur County that should be reversed because in the assignment of errors filed in this court the only errors complained of are errors of the Supreme Court of Oregon and the prayer is for a reversal of the decree of that court.

Transcript of Record, p. 46-7.

This furnishes an additional argument for dismissing the writ of error as improperly directed to the Circuit Court of Malheur County.

SECOND.

The jurisdiction of the Supreme Court is asserted under the third of the classes of cases enumerated in Sec. 709 R. S., and it is thoroughly well settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but this must be done at the proper time and in the proper way. The proper time is in the trial court and the proper way is by appropriate pleading, or being made part of the record, showing that the claim was presented to the court.

The Federal question that plaintiff in error (Defendant Adams) now seeks to inject into this case, namely, that under the Timber Culture Act he could not lawfully sell the land before completing his final proof, was never presented to the State Court. The point he now makes must have been relied upon by him and called to the attention of the court below and a decision rendered against him before this court, will consider the same. The point was neither made nor relied on in the State Court. The only thing akin thereto is the *argument* made in the Supreme Court of Oregon that the contract of Adams to sell the land to the partnership is void as against public policy. This is not setting up or claiming a right, title, privilege or immunity under a statute of the United States.

Jurisdiction cannot arise from inference but only from averments so distinct and positive as to prove beyond question that the party intended to assert a Federal right.

Mutual Life Etc. vs. McGrew, 188 U. S. 291.

Beals vs. Cone, 188 U. S. 184.

Kipley vs. Illinois, 170 U. S. 182.

N. Y. vs. Woodruff, 153 U. S. 689.

Oxley vs. Butler, 166 U. S. 648.

Levy vs. San Francisco, 167 U. S. 175.

Capital Etc. vs. Cadiz, 172 U. S. 425.

It is apparent from an inspection of the pleadings in this case as well as by reference to the findings of the trial court that the defendant set up no right, title, privilege, or immunity under a statute of the United States, the decision of which was adverse to him in that particular. The defendant neither in his answer nor upon the hearing relied upon the claim now made that the Timber Culture Act inhibited a sale of the land prior to making his final proof, but he resisted the plaintiff's contention that the land was partnership property upon the sole ground that he had not sold or contracted to sell the same to the firm, and that he had received no consideration therefor.

It has been repeatedly held that to sustain a writ of error from the Supreme Court something more must appear than that the parties claim title under an act of Congress.

DeLamar Etc. vs. Nesbitt, 177 U. S. 523.

Blackburn vs. Portland, Etc., 175 U. S. 571.

Gold W. Co. vs. Keyes, 96 U. S. 199.

McStay vs. Friedman, 92 U. S. 723.

The statute must be specially set up by the party and the decision must have been against the claim.

Montgomery vs. Harnandez, 12 Wheat. 129.

The right on which the party relies must have been called to the attention of the court below in some way and the decision of that court must have been against the right claimed.

Maxwell vs. Newbold, 18 How. 511.
Haywood vs. Denny, 158 U. S. 180.
Miller vs. Cornwall, 168 U. S. 131.
Union M. I. Co. vs. Kirchoff, 169 U. S. 103.

BRIEF ON THE MERITS.

It is contended on the part of the Defendant Adams that the Timber Culture Act prohibits the sale by an entryman of the land entered prior to making his final proof. We can find no such provision in the law. The entryman is required to make an affidavit to the effect that he made his application in good faith and not for the purpose of speculation and that he intends to hold and cultivate the land. There is nothing in the act which inhibits the sale of the land after the entryman has complied with the law and completed his entry. No one contends that Adams did not make his application in good faith or that his purpose was otherwise than to hold and cultivate the land. There is nothing in the case to indicate that his entry was made for the purpose of speculation. After making his entry and complying with the law in good faith and without any previous intention or purpose so to do, Adams contracted to sell to the partnership firm of Steel & Adams the land in question and this under the law he had the absolute right to do. As was said by the Supreme Court of Oregon in construing this provision of the act, "We do not understand this provision to inhibit the Timber Culture claimant who has made his entry in good faith from contracting to sell his claim prior to the final proof and the law seems to be so interpreted by the Land Department of the United States.

Sims vs. Bruse, 4 L. D. 369.
U. S. vs. Read, 5 L. D. 313."

And as sustaining this view of the law in analogous cases, see

Arnold vs. Christy, 33 Pac. Rep. 619.

Palmer vs. Marsh, 24 N. W. Rep. 374.

Richards vs. Crews, 11 Oregon 501.

Hyde vs. Holland, 18 Or. 337.

Orr vs. Stewart, 67 Cal. 275.

Lang vs. Morey, 40 Minn. 396.

Upon the question of fact, as to whether Adams contracted to sell to the partnership of Steel and Adams and received the consideration, for the Timber Culture tract, this Court is concluded by the findings of the Supreme Court of Oregon.

It has been repeatedly held, on error to a state court in a chancery case (as also in a case at law) when the facts are found by the court below, that the Supreme Court is concluded by such findings.

Egan vs. Hart, 165 U. S. 188.

Dower vs. Richards, 151 U. S. 658.

Bartlett vs. Lockwood, 160 U. S. 357.

Stanley vs. Schwalby, 162 U. S. 255.

As the writ of error was directed to the wrong court, and also because there was no Federal question raised or relied upon in the court below, the writ of error should be dismissed. Should this court, however, see proper to consider the case upon its merits, we respectfully submit that the decree of the Supreme Court of Oregon should be affirmed.

JOSEPH SIMON.
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 169.—October Term, 1903.

I. H. Adams, Plaintiff in Error,
vs.
J. M. Church, Administrator of R. M. Steel, deceased.

In error to the Circuit Court of Malheur County, State of Oregon.

[March 21, 1904.]

This is an appeal from a decree of the Circuit Court of Malheur County, State of Oregon, entered by direction of the Supreme Court of Oregon.

The action originated in a suit by Steel against Adams to settle the affairs of a copartnership theretofore carried on by the parties, and so far as a Federal question is concerned, involves the right of the plaintiff below to have conveyed to him an interest in a certain tract of land, acquired by Adams under the Timber Culture Act, before the formation of the partnership. (20 Stat. 113.) The defendant denies that this tract of land was included in the partnership property. Upon appeal to the Supreme Court of Oregon, upon whose direction the decree was entered, it was found that at the time of the formation of the partnership Adams was the owner of a timber culture claim covering the land in controversy, and the contention of the plaintiff, that it was agreed and understood at the time of forming the partnership that such claim should be conveyed to and become a part of the assets of the firm as soon as Adams should acquire title from the government, was sustained.

The Federal question made is that such agreement is void as against the statutes and policy of the United States.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the Court.

The finding of facts made in the Supreme Court of Oregon is binding upon this court and will be the basis of decision here. (*Egan* v. *Hart*, 165 U. S. 188; *Dower* v. *Richards*, 151 U. S. 658.)

It appears that Adams made the entry under the Timber Culture Act before the partnership agreement was entered into, and there is nothing in the record to show that, in taking the preliminary oath required by the statute, he acted otherwise than in good faith, and stated the truth as to the situation and his purpose in making the entry. As recited in the title, the purpose of the act is to encourage the growth of timber on the Western prairies, and it is intended to induce settlers to plant and cultivate trees

with a view to receiving a patent of the lands thus improved. Section 2 of the act (20 Stat. 113) requires the person applying for the benefit of the law to make affidavit that he is the head of a family (or over twenty-one years of age) and a citizen of the United States, or has declared his intention to become such; that the land specified is devoid of timber; that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act, and has not made other entry under the law. Before a final certificate can be given or patent issue, eight years must elapse from the date of entry, and if at the expiration of that time, or within five years thereafter, the person making the entry, or in event of death his heir or legal representative, shall prove by two credible witnesses that he, she or they have planted, and for not less than eight years have cultivated and protected, the required quantity and character of trees; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof there shall be then growing six hundred and seventy-five living and thrifty trees on each acre, a patent shall issue for the land.

It is the contention of the plaintiff in error that these provisions demonstrate the policy of the law to grant the lands in question to the person filing the entry, his heirs and legal representatives, and none other; and that to make the sale of an interest in the lands to another as a partner, as is found to have been done in this case, is void as against public policy. It is pointed out that the final affidavit, required by the rules and regulations of the General Land Office made under authority of section 5 of the act, is to be in the same terms as the preliminary one, and requires the claimant to make oath that his entry was made in good faith, and not for the purpose of speculation or indirectly for the benefit of any other person whomsoever.

This requirement and the general purpose indicated in the terms of the act, it is argued, bring the case within the reasoning and spirit of *Anderson* v. *Carking*, (130 U. S. 483.) In that case it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader made after settlement and before the oath is filed for final certificate. But the homestead act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit of any other person. (Rev. Stat. sec. 2290.)

Further, the final proof requires affidavit by the applicant "that no part of such land has been alienated except as provided in section 2288," (Rev.

Stat. § 2291) which section limits the right of alienation to "church, cemetery or school purposes, or for the right of way for railroads."

In this state of the law, this court, in the Anderson case, in an opinion by Mr. Justice Brewer, sustained the contention in behalf of Anderson "that the homestead is a gift from the Government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit of non-alienation is as clear an expression of legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal." And that courts of equity would not enforce the performance of such contracts "founded upon perjury and entered into in defiance of a clearly expressed will of the government." But this case is very far from supporting the contention of the plaintiff in error as to the construction of the Timber Culture Act. There is no requirement in the latter act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the Timber Culture Act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, and the prairies theretofore barren of timber have been supplied with trees to the extent required by the law before the title shall pass from the government. The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the government.

This conclusion is in conformity with the decisions of the Land Department in *Sims* v. *Bruce*, (4 L. D. 309,) and *United States* v. *Read*, (5 L. D. 313.) In these cases the right of the timber culture entryman to dispose of his holding, acquired by him in good faith, before the final certificate, is fully recognized. It is argued that, conceding these decisions to hold that such entryman can sell his claim after entry and before final proof, it does not follow that he can sell it and agree to prove up the entry claim and obtain a patent with a promise to convey it to another, without violating the policy of the law. But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason

why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. (*Myers* v. *Craft*, 13 Wall. 291.)

To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.

The decree of the State court is *Affirmed*.

True copy.

Test:

Clerk Supreme Court, U. S.